

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1944

No. 148

WEBRE STEIB COMPANY, LTD., PETITIONER,

vs.

COMMISSIONER OF INTERNAL REVENUE

**ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE FIFTH CIRCUIT**

PETITION FOR CERTIORARI FILED JUNE 12, 1944.

CERTIORARI GRANTED OCTOBER 9, 1944.



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TRANSCRIPT OF RECORD

**United States Circuit Court of Appeals,
FIFTH CIRCUIT**

COMMISSIONER OF INTERNAL REVENUE,
Petitioner,

versus

WEBRE STEIB COMPANY, LTD.,
Respondent.

WEBRE STEIB COMPANY, LTD.,
Petitioner,

versus

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

**On Petition to Review the Decision of
the Tax Court of the United States**

STIPULATION AND ORDER CONSOLIDATING
CASES NOS. 10,641 and 10,657 FOR HEAR-
ING, BRIEFING & ENTRY OF JUDG-
MENT, FILED 5/24/43.

IN THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE FIFTH CIRCUIT

GUY T. HELVERING, Commissioner of
Internal Revenue,
v. Petitioner on Review,

No. 10641

WEBRE STEIB COMPANY, LTD.,
Respondent on Review.

T.C. Docket No. 389 P.T.

WEBRE STEIB COMPANY, LTD.,
v. Petitioner on Review,

No. 10657

GUY T. HELVERING, Commissioner of
Internal Revenue,
Respondent on Review.

STIPULATION FOR CONSOLIDATION OF
CASES ON APPEAL

It is hereby stipulated and agreed by and between
Guy T. Helvering, Commissioner of Internal Revenue, the
petitioner and cross-respondent on review in the above-
styled cases, respectively, and Webre Steib Company, Ltd.,
the respondent and cross-petitioner on review, respective-
ly, by their respective attorneys of record, that an order

be entered by this Honorable Court for the consolidation of the above cases for the purpose of hearing, briefing, and the entry of judgment, respectively.

Samuel O. Clark, Jr.

Samuel O. Clark, Jr., K.F.B.
Assistant Attorney General.

J. P. Wenchel

J. P. Wenchel, K.F.B.
Chief Counsel,
Bureau of Internal Revenue.
Attorneys for Guy T. Helvering,
Commissioner of Internal Revenue.

C. J. Batter

C. J. Batter,
Attorney for Webre Steib Company,
Ltd.

REM, JR./MMc 5-17-43.

IN THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 10641. GUY T. HELVERING, Commissioner of Internal Revenue, Versus WEBRE STEIB COMPANY, LTD.

No. 10657, WEBRE STEIB COMPANY, LTD., Versus GUY T. HELVERING, Commissioner of Internal Revenue.

ORDER:—

ON CONSIDERATION of the stipulation for consolidation of the above entitled and numbered cases on appeal for the purpose of hearing, briefing, and the entry of judgment, respectively,

IT IS ORDERED that the above numbered and entitled cases be consolidated in this Court for the purpose of hearing, briefing, and the entry of judgment, respectively.

(Signed) J. C. HUTCHESON, JR.

United States Circuit Judge

New Orleans, La. May 24th 1943.

IN THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE FIFTH CIRCUIT

GUY T. HELVERING, Commissioner of
Internal Revenue,

Petitioner on Review,

v.

No. 10641

WEBRE STEIB COMPANY, LTD.,

Respondent on Review.

T.C. Docket No. 389 P.T.

WEBRE STEIB COMPANY, LTD.,

Petitioner on Review,

v.

No. 10657

GUY T. HELVERING, Commissioner of
Internal Revenue,

Respondent on Review,

MOTION

To the Honorable Judges of the United States Circuit Court of Appeals for the Fifth Circuit:

COME NOW the parties to the above-entitled causes, by their respective counsel of record, and move that the Court enter an order herein extending the time

within which the transcript of the record on review in said causes may be filed with the Clerk of this Court by The Tax Court of the United States to and including July 18, 1943, and, for cause of this motion, respectfully show:

That the parties are now engaged in the preparation of a joint praecipe for record directed to The Tax Court of the United States and it will not be possible, prior to July 18, 1943, to complete and file with The Tax Court of the United States the joint praecipe for record and to have the transcript of the record on review transmitted to this Court by the said Tax Court.

WHEREFORE, it is prayed that this motion be granted and that the Clerk of this Court be directed to transmit to the Clerk of The Tax Court of the United States certified copies of this motion and the order entered pursuant thereto, for incorporation in the record on review.

Samuel O. Clark, Jr.,

 Samuel O. Clark, Jr., K.F.B.
 Assistant Attorney General.

J. P. Wenchel

 J. P. Wenchel K.F.B.
 Chief Counsel,
 Bureau of Internal Revenue.
 Attorneys for Guy T. Helvering,
 Commissioner of Internal Revenue.

C. J. Batter,

 C. J. Batter,
 Attorney for Webre Steib Company,
 Ltd.

REM,JR./MMc 5-20-43.

The Tax Court of the United States
Filed June 5, 1943.

IN THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 10641. GUY T. HELVERING, Commissioner of Internal Revenue, Versus WEBRE STEIB COMPANY, LTD.

No. 10657, WEBRE STEIB COMPANY, LTD., Versus GUY T. HELVERING, Commissioner of Internal Revenue.

ORDER:—

Upon consideration of the motion of the parties in the above-mentioned causes for an extension of time within which to complete and transmit the transcript of the record on review in said causes,

It is this 3rd day of June, 1943, ordered that the time within which to complete and transmit the transcript of the record on review be extended to and including July 18, 1943.

And it is further ordered that the motion and this order be incorporated in and made a part of the record on review, and that the Clerk of this Court transmit to the Clerk of The Tax Court of the United States a certified copy of the motion and this order.

By the Court,

(Signed) J. C. HUTCHESON, JR.

United States Circuit Judge

New Orleans, La. June 3rd, 1943.

CLERK'S OFFICE:—

ATTEST:—

A TRUE COPY:—

Oakley F. Dodd

Clerk, U. S. Circuit Court of Appeals,
Fifth Circuit.

New Orleans, La., June 3, 1943.

(SEAL)

Now, July 13, 1943, the foregoing order certified from the record as a true copy.

B. D. Gamble

Clerk, The Tax Court of the United States.

(SEAL)

P. T. DOCKET NO. 389
WEBRE STEIB COMPANY, LTD.,
Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

APPEARANCES

For Taxpayer: Carl J. Batter, Esq., 12/3/40.
902 American Security Bldg.,
Washington, D. C.

For Comm'r.: J. P. Wenchel, Esq.,
Raymond F. Brown, Esq.,
Royal E. Maiden, Jr. Esq.,

DOCKET ENTRIES

1941

Jul.

1—Petition received and filed. Fee paid.

"

1—Two copies of petition served on Chief Counsel, Bureau of Internal Revenue.

- Aug. 11—Respondent filed answer to the petition.
- " 11—Copy of answer served on petitioner by Registered Mail No. 307136.
- " 27—Copy of notice setting hearing on merits January 13, 1942 at New Orleans, La., sent to petitioner and respondent by Registered Mail Nos. 307165 and 307166 respectively.
- Nov. 29—Petitioner filed motion to continue hearing on merits. No objection by respondent.
- Dec. 8—Copy of order continuing hearing on merits to April 14, 1942 at New Orleans, La. sent to petitioner and respondent by Registered Mail Nos. 307388 and 307389 respectively. Copy of petitioner's motion to continue sent to respondent by Registered mail No. 307389.
- 1942
- Mar. 10—Copy of notice giving hearing room location sent to petitioner and respondent by Registered Mail Nos. 307662 and 307665 respectively.
- " 10—Chairman assigned Member Seay the Presiding Officer to conduct the hearing on the merits.
- Apr. 14, 15—Hearing on merits at New Orleans, La., before Member Seay. Hearing continued from April 15, 1942 to further date in Washington, D. C.
- May 4—Copy of notice continuing hearing on merits on May 8, 1942 at Washington, D. C. sent to petitioner and respondent by Registered Mail Nos. 307741 and 307742 respectively.
- " 8—Hearing on merits concluded.
- " 14—Petitioner filed joint agreement of parties with respect to correction of transcript of testimony taken at hearing on merits.

- Jun. 16—Petitioner filed brief to Presiding Officer.
 “ 22—Respondent filed brief to Presiding Officer.
- Sep. 17—Petitioner filed joint stipulation with respect to the units of commodity processed.
 “ 23—Finding of fact and decision recommended by Presiding Officer.
 “ 23—Copy of recommended findings of fact and decision and copy of notice giving each party to and including October 23, 1942 within which to file briefs sent to petitioner and respondent by Registered Mail Nos. 307936 and 307938 respectively.
- Oct. 20—Respondent filed request for findings of fact and decision and brief in support thereof.
 “ 23—Petitioner filed brief with respect to Presiding Officer's recommendation.
- Nov. 24—Decision rendered showing refund of \$3,655.82 due petitioner. Copy of findings fact, decision and memorandum sent to petitioner and respondent by Registered Mail Nos. 307150 & 307151 respectively, Edwards dissents. Crewe took no part.
- Dec. 30—Petitioner filed motion for rehearing.
 “ 30—Copy of above motion served on respondent.
 “ 30—Respondent filed Motion for rehearing, reconsideration and redetermination.
 “ 30—Respondent filed memorandum in support of respondent's motion for rehearing, reconsideration and redetermination.
 “ 30—Copy of above motion served on petitioner by Registered Mail No. 307177.
- 1943
- Jan. 2—Motion to place on calendar for hearing filed by taxpayer.

- “ 5—Order to show cause, on or before 2/2/43 why The Tax Court should not proceed to decide this case upon the record already submitted and the briefs already filed entered.
- “ 5—Hearing set Feb. 2, 1943 on motion.
- “ 5—Copy of motion and order to show cause and notice of hearing served on General Counsel.
- “ 30—Response to order to show cause filed by General Counsel.
- Feb. 2—Hearing had before Judge Murdock on motion of petitioner for rehearing and upon order to show cause. Continued to 2/2/43. (Leave to petitioner to file further response filed)
- “ 2—Order of continuance to the Washington, D. C. calendar of 2/10/43 for further hearing upon the petitioner's motion and the Court's order to show cause entered.
- “ 10—Hearing had before Judge Murdock on motion of respondent and of petitioner for rehearing and order to show cause. Argued re motions for rehearing.
- “ 11—Order that the three motions filed 12/30/42 and 1/2/43 be denied entered.
- “ 18—Transcript of hearing of Feb. 10, 1943 filed.
- Apr. 21—Certified copy of petition for review by Commissioner received from 5th Circuit filed.
- “ 21—Certified copy of order to file petition for review in 5th Circuit and to serve petition and copy of this order on Tax Court to forthwith certify and file in 5th Circuit a transcript of the record filed.
- May 10—Certified copy of petition for review by taxpayer received from 5th Circuit filed.

- “ 10—Certified copy of order to file petition for review in 5th Circuit and to serve petition and copy of this order on Tax Court to forthwith certify and file in 5th Circuit a transcript of the record filed.
- Jun. 5—Certified copy of order from the 5th Circuit extending the time to July 18, 1943 to complete and transmit the record filed.
- Jul. 2—Agreed stipulation of additional facts not appearing in the findings of fact and decision of the U. S. Processing Tax Board of Review promulgated and dated Nov. 24, 1942 filed (Both causes)
- “ 2—Joint designation of portions of record filed. (Both causes)
- “ 7—Agreed stipulation that certain additional facts together with the facts appearing in the findings of fact and decision of the U. S. Processing Tax Board of Review, promulgated 11/24/42 represent and constitute all the facts introduced in evidence and appearing in the record made at the hearing on the merits before the U. S. Processing Tax Board of Review filed. (Both causes)
- “ 7—Joint designation of portions of record proceedings and evidence to be contained in the record on review filed. (Both causes)
-

Fee paid

Filed 10:50 a.m. Jul-1 1941
United States Processing Tax
Board of Review R

UNITED STATES PROCESSING TAX BOARD
OF REVIEW

WEBRE STEIB CO., LTD.

Petitioner,

v.

COMMISSIONER OF INTERNAL
REVENUE,

Respondent,

Docket No. 389

PETITION

The above-named petitioner hereby requests a hearing on the merits of its claim for refund, which was disallowed, in whole, by notice of the Commissioner of Internal Revenue dated April 10, 1941, bearing symbols IT:UE:I HHK, and as a basis of its proceeding alleges as follows:

I

The petitioner is a corporation, organized under the laws of the State of Louisiana with its principal office at Vacherie, Louisiana.

II

The notice of disallowance (a copy of which is attached and marked Exhibit "A") was mailed to the petitioner by registered mail on April 10, 1941.

III

A copy of the claim for refund filed is attached and marked Exhibit "B". Said claim for refund involves processing taxes for period commencing October 1, 1943 and ending November 30, 1935 in the amount of \$8,169.97.

IV

The disallowance of the claim for refund in whole, set forth in the said notice of disallowance, is based upon the following errors:

(1) The Commissioner of Internal Revenue *erred in failing to find that the claimant did not shift any of the processing taxes to its vendees, or to anyone else.*

(2) The Commissioner erred in failing to find that the claimant *incurred a loss* from the sale of articles with respect to which such tax was imposed.

(3) The Commissioner erred in failing to find that the claimant *incurred a loss from the sale* of articles with respect to which such tax was imposed and in addition thereto suffered a further loss of the amount of the tax paid.

(4) The Commissioner erred in failing to allow in full claimant's claim for refund in the amount of \$8,169.97.

V

The facts upon which petitioner relies as a basis of this proceeding are as follows:

(a) That the processing tax paid during the period *October 1, 1934 and ending November 30, 1935* amounted to \$8,169.97.

(b) That such processing tax was paid on the processing of sugar.

(c) That this petitioner is and was during the tax period engaged in the growing of sugarcane, and grinding such cane and making therefrom sugar and molasses.

(d) That none of the processing taxes paid have been refunded.

(e) That this petitioner bore the burden of such tax and has not been relieved thereof nor reimbursed therefor nor shifted such burden, directly, or indirectly, (1) through inclusion of such amount by the claimant, or

by any person directly or indirectly under its control, or having control over it, or subject to the same common control, in the price of any article with respect to which a tax was imposed under the provisions of such Act, or in the price of any article processed from any commodity with respect to which a tax was imposed under such Act, or in any charge or fee for services or processing; (2) through reduction of the price paid for any such commodity; or (3) in any manner whatsoever; and that no understanding or agreement, written or oral, exists whereby it may be relieved of the burden of such amount, be reimbursed therefor, or may shift the burden thereof.

(f) That the legislation imposing a processing tax on sugar was so constructed, and the powers and authority given to and exercised by the President of the United States and his Secretary of Agriculture were sufficiently broad so as to prevent and did prevent, *the passing on or passing back of said processing tax*;

(g) That the taxpayer *absorbed the entire amount* of the processing tax.

(h) That on off-shore raw sugar the President of the United States made two reductions of tariff during 1934.

(i) That the Secretary of Agriculture, by failing to make *compensating payments as required by law to sugarcane growers*, found as a fact that said growers did not bear the tax.

(j) That the *marketing territory of petitioner is limited*.

(k) That the four payment plan by which sugar is sold by the petitioner creates a final selling price that, in the case of price declines, is controlled by happenings a month hence, and beyond the control of the seller.

(l) That the petitioner sells its sugar at a discount from standard brands.

(m) That the petitioner is *so small a factor* in the

sugar trade that he cannot set his selling price, but must be governed by competition and the price of standard brands.

(n) An analysis of the accounting records of petitioner discloses: that it bore the burden of such tax and has not been relieved thereof nor reimbursed therefor nor shifted such burden, directly or indirectly (1) through inclusion of such amount by the claimant, or by any person directly or indirectly under its control, or having control over it, or subject to the same common control in the price of any article with respect to which a tax was imposed under the provisions of such Act, or in the price of any article processed from any commodity with respect to which a tax was imposed under such Act, or in any charge or fee for services or processing, (2) through reduction of the price paid for any such commodity, or (3) in any manner whatsoever; and that no understanding or agreement, written or oral, exists whereby it may be relieved of the burden of such amount, be reimbursed therefor, or may shift the burden thereof.

(o) That during the post tax period, February to July 1936, the average selling price of sugar was in excess of the average price obtained during the period the processing tax was in effect.

VI

It is respectfully requested that the hearing on the merits of this claim for refund be held in New Orleans, Louisiana.

WHEREFORE, the petitioner prays that this Board may hear the proceedings and decide that the petitioner is entitled to a refund upon the facts and law of \$8,169.97 and interest thereon from the dates of payment.

(s) Carl J. Batter

CARL J. BATTER

Attorney for Petitioner

902 American Security Building
Washington, D. C.

STATE OF LOUISIANA

PARISH OF ST. JAMES

} SS:

ROWLAND C. STEIB, being duly sworn, says that he is the President of the petitioner, WEBRE STEIB COMPANY, LTD., and that he is duly authorized to verify the foregoing petition; that he has read the foregoing petition, and is familiar with the statements contained therein, and that the facts stated are true, except as to those stated to be upon information and belief, and those facts he believes to be true.

(s) Rowland C. Steib

Rowland C. Steib

Subscribed and sworn to before me this
28th day of June, 1941.

(SEAL)

(s) H. J. Agreguard

Notary Public

C O P Y

IT:UE:I
HHK

APR 10 1941

The Webre-Steib Company, Ltd.,
Vacherie, Louisiana

In re: Claim No. F-2602.
Amount: \$8,169.97.

Sirs:

Reference is made to the above-described claim for refund of processing tax paid under the provisions of the Agricultural Adjustment Act.

Section 902 of the Revenue Act of 1936 provides that no refund shall be made or allowed of any amount paid as tax under the Agricultural Adjustment Act unless the

claimant establishes to the satisfaction of the Commissioner that he bore the burden of such amount and has not been relieved thereof, nor reimbursed therefor, nor shifted such burden, directly or indirectly, as further set forth in that section.

An examination of the evidence submitted in support of your claim discloses that *you have not established that you bore the burden of the tax, refund of which is claimed.* Accordingly, your claim is hereby disallowed in the full amount.

The disallowance of your claim will become final upon the expiration of three months after the date of the mailing of this letter unless within such period you have filed a petition with the United States Processing Tax Board of Review, Munsey Building, Washington, D. C., for a hearing on the merits of the claim.

Respectfully,

Guy T. Helvering,
Commissioner.

By

(Signed) T. Mooney
Deputy Commissioner.

- cc Collector of Internal Revenue,
New Orleans, Louisiana
- cc Internal Revenue Agent in Charge,
422 Post Office Building,
Dallas, Texas.

HHK/MCN-1

EXHIBIT "A"

FORM 1042-A—PROCESSING TAX PAYMENTS BY CHECKS TO THE DEPARTMENT OF INTERNAL REVENUE

FOR COLLECTOR'S USE—CERTIFICATE

Date of payment	Amount of each payment as per check or cash receipt	Total amount of payments for the month	Penalty	Interest	Date of each payment	Amount in each payment	Collector's Use—Certificate				
							Pay		Amount		
							Amount	Date	Lot	Page	L.
11-04-55	342.75	342.75	-	-	11-04-55	342.75					
11-05-55	4,500.10	4,500.10	-	-	11-05-55	4,500.10					
	4.02	4.02	-	-	11-05-55	4.02					
	4,504.12	4,504.12	-	-	11-05-55	4,504.12					
11-06-55	1,572.54	1,572.54	-	-	11-06-55	1,572.54					
	22.02	22.02	-	-	11-06-55	22.02					
	1,594.56	1,594.56	-	-	11-06-55	1,594.56					
11-07-55	124.00	124.00	-	-	11-07-55	124.00					
	4.04	4.04	-	-	11-07-55	4.04					
	128.04	128.04	-	-	11-07-55	128.04					
11-07-55	1,400.00	1,400.00	-	-	11-07-55	1,400.00					

10

Address _____

100

[illegible]

Subscribed and sworn to before me this _____ day of _____, 19____.

day of _____ 193_____

100

(Signature of Person Submitting) _____

(Responses of other administering units)

CTA

1992

Statement of Claimant

(City and State)

(Date)

(1) Description of commodity processed and amount of processing tax on such commodity	(2) Amount of burden of processing tax on the commodity named above as shown in Schedule A	(3) Amount of processing tax paid on the commodity named above as shown in Schedule B	(4) Amount of refund of processing tax on the commodity named above as shown in Schedule C	(5) Balance of refund
	Debit	Credit	Debit	Credit

I (or affirm) with respect to this claim and the schedule and other evidence submitted as a part thereof:

That the amount and date of each payment of processing tax on the processing of the commodity named above as shown in Schedule A are true and correct;

That the amounts of processing tax on the processing of the commodity named above, heretofore refunded or credited to claimant as shown in Schedule B, are the total amounts of such refunds and credits;

That the amounts of processing tax on the processing of the commodity named above, heretofore refunded or credited to claimant as shown in Schedule C, are the total amounts of such refunds and credits of which claimant has no knowledge;

That the amount of the burden of the processing tax on the processing of the commodity named above which was borne by the claimant as set forth in column 2 above is true and correct; that the claimant has not been relieved thereof nor reimbursed therefor nor shifted such burden, directly or indirectly, (1) through reduction of such amount by the claimant, or by any person directly or indirectly under his control, or having control over him, or subject to the same common control, in the price of any article processed from such commodity; (2) through reduction of the price paid for such commodity; or (3) in any manner whatsoever; and that no understanding or agreement, written or oral, exists whereby he may be relieved of the burden of such amount, be reimbursed therefor, or may shift the burden thereof; and (4) that the data and statements submitted in and made a part of Schedule D are true and correct;

That the amounts of processing tax shown in column 3 and Schedule B, having been passed on and repaid were not additionally repaid to vendors, each of whom has furnished evidence which is attached showing that he has borne the burden thereof, has not been relieved thereof, nor reimbursed therefor, and has not shifted such burden, directly or indirectly, and is not entitled to receive any reimbursement therefor from any other source, or to be relieved of such burden in any manner whatsoever;

That no other claim has been filed by claimant on P. T. Form 79 for refund of any part of the amount of this claim; and that the claimant is entitled to and demands payment of this claim in the amount shown above.

Subscribed and sworn to before me this

day of _____, 193__

(Signature of officer administering oath) (TIN)

(Name of claimant)

(Signature of person submitting affidavit)

(State whether defendant is a member of firm, or partner, or proprietor, or sole owner, or agent, or employee, or other person in connection with the business of the defendant)

Section 35, United States Criminal Code, as amended, provides a fine of \$10,000 or 10 years imprisonment, or both, for the filing of a false claim, for making of a false statement in an affidavit, or for falsifying, concealing, or covering up by any trick, scheme, or device, a material fact in connection with a claim.

Examined by _____

Approved _____

(Name of claimant)

10

The burden of proving tax is upon any tax or excise threatened or imposed by the Government, and is upon the person liable for the payment of such tax or excise, and is upon the person who is the owner of the property at the time of the payment of such tax or excise.

This image shows a blank, aged, cream-colored page, likely an endpaper or flyleaf of a book. The paper has a slightly textured appearance with some minor discoloration and small dark spots, possibly due to age or handling. The left edge of the page is bound, showing the stitching and the inner cover material. There is no text or other markings on the page.

The image shows a document page that is severely degraded. It features a grid-like structure, likely a table or ledger, with multiple columns and rows. The text is mostly illegible due to heavy noise, including vertical streaks and horizontal banding. Some faint, repeating patterns of text are visible, suggesting a structured layout. The text appears to be in a non-Latin script, possibly Cyrillic or Greek, but is too blurry to transcribe accurately.

(1)	(2)	(3)	(4)	(5)
<p>1. Name of the person or organization to whom the award is being made.</p> <p>2. Address of the person or organization to whom the award is being made.</p> <p>3. City and State of the person or organization to whom the award is being made.</p> <p>4. Country of the person or organization to whom the award is being made.</p> <p>5. Date of the award.</p>	<p>1. Name of the person or organization to whom the award is being made.</p> <p>2. Address of the person or organization to whom the award is being made.</p> <p>3. City and State of the person or organization to whom the award is being made.</p> <p>4. Country of the person or organization to whom the award is being made.</p> <p>5. Date of the award.</p>	<p>1. Name of the person or organization to whom the award is being made.</p> <p>2. Address of the person or organization to whom the award is being made.</p> <p>3. City and State of the person or organization to whom the award is being made.</p> <p>4. Country of the person or organization to whom the award is being made.</p> <p>5. Date of the award.</p>	<p>1. Name of the person or organization to whom the award is being made.</p> <p>2. Address of the person or organization to whom the award is being made.</p> <p>3. City and State of the person or organization to whom the award is being made.</p> <p>4. Country of the person or organization to whom the award is being made.</p> <p>5. Date of the award.</p>	<p>1. Name of the person or organization to whom the award is being made.</p> <p>2. Address of the person or organization to whom the award is being made.</p> <p>3. City and State of the person or organization to whom the award is being made.</p> <p>4. Country of the person or organization to whom the award is being made.</p> <p>5. Date of the award.</p>

I believe that the amount shown above, namely, \$_____, is the correct amount of the processing tax paid by claimant and not shifted to others. (If claimant agrees that this figure is correct any additional facts and evidence should be set out and made a part of Schedule A-2.)

I believe that the amount shown above is not the correct amount of the processing tax paid by claimant and not shifted to others. The correct amount is \$2,300.00, for the reasons and upon the evidence set out and made a part of Schedule A-2.

Exhibit, statement of facts, and other documents submitted with and made a part of this report.

REVENUE & FINANCE DEPT. OF SALES, DEPT. OF SALES & COMM. DIVISION

THE 1977 REPORT TO THE BOARD AND SHAREHOLDERS

THE UNIVERSITY OF CHICAGO PRESS

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STATEMENT OF SALES, COST OF SALES AND GROSS PROFIT

THE WEBRE STEIB COMPANY, LTD.

	1932 CROP		1933 CROP		1934 C
	AMOUNT	% TO SALES	AMOUNT	% TO SALES	
SALES:	\$ 59,103.47		\$ 116,810.03		\$ 59,001.00
Sugar and Molasses Sales					
DEDUCT	26,759.33		39,964.66		
Inventory at Beginning of Period	\$ 32,344.14		\$ 76,843.37		\$ 59,001.00
ADD	39,964.66				192.00
Inventory at End of Period					
TOTAL SUGAR AND MOLASSES SALES - CURRENT YEAR	\$ 72,308.80	100%	\$ 76,845.37	100%	
COST OF PRODUCING AND MANUFACTURING:					
Cane Purchases - Outside	\$ 27,434.80		\$ 26,375.46		16,377.63
DIRECT SALARIES AND LABOR					
Plantation - Producing Cane	10,289.73		10,261.17		10,191.10
Sugar House	7,181.44		5,926.42		4,407.57
PRIME COST	\$ 44,905.97		\$ 42,563.05		\$ 31,976.30
Producing and Manufacturing Expenses	\$ 26,126.18		\$ 28,961.39		\$ 24,303.11
TOTAL COST OF PRODUCING AND MANUFACTURING	\$ 71,032.15	98.23	\$ 71,524.44	93.08	
GROSS PROFIT ON SUGAR AND MOLASSES	\$ 1,276.65	1.77	\$ 5,320.93	6.92	
Processing Taxes Paid United States Government					
GROSS PROFIT OR LOSS AFTER PROCESSING TAXES	\$ 1,276.65	1.77	\$ 5,320.93	6.92	
TOTAL TONS CANE PROCESSED:					4,912
Purchased	10,150		7,831		6,510
Produced	7,208		6,014		
TOTAL PROCESSED	17,358		13,845		
AVERAGE PER TON:					
Sales	\$ 4.16		5.55		
Cost	4.09		5.17		
GROSS PROFIT	\$.07		\$.38		
Tax					
GROSS PROFIT AFTER TAX					

OMPANY, LTD.

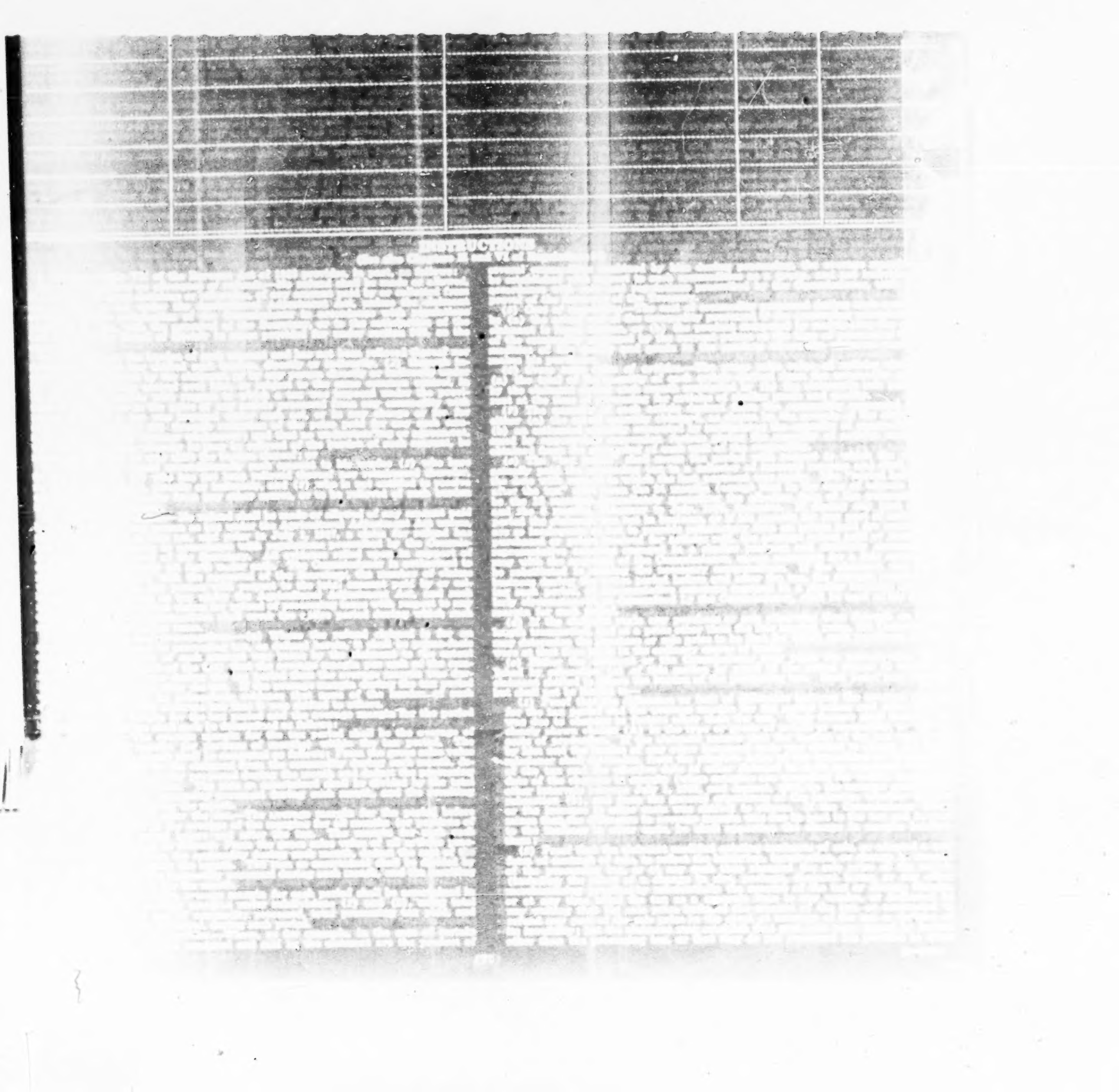
YEARS 1932 - 33 - 34 - 35

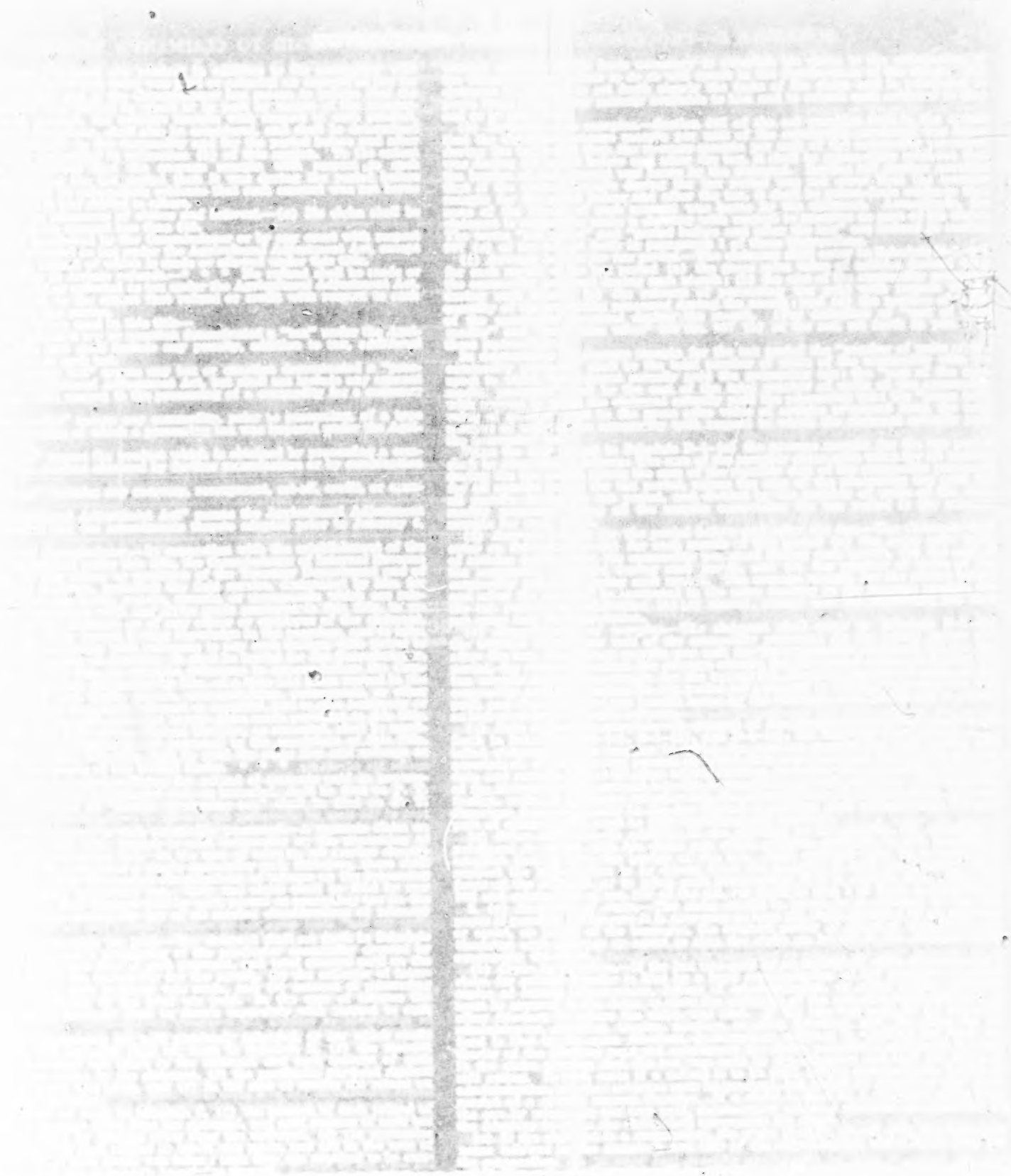
1934 CROP		1935 CROP	
AMOUNT	% TO SALES	AMOUNT	% TO SALES
59,001.00		\$ 26,832.58	
		192.00	
\$ 59,001.00		\$ 26,640.58	
192.00		23,957.49	
\$ 39,193.00	100%	\$ 50,598.07	100%
16,377.63		\$ 10,040.88	
10,191.10		12,116.32	
5,407.57		6,176.63	
\$ 31,976.30		\$ 28,334.13	
\$ 24,303.11		\$ 24,797.62	
\$ 56,279.41	95.08	\$ 53,131.75	105.00
\$ 2,913.59	4.92	\$ (2,533.68)	(5.00)
6,574.26	(11.10)	1,569.89	(3.10)
\$ (3,660.67)	(6.18)	\$ (4,103.57)	(8.10)
4,912		6,015	
6,510		2,910	
11,422		8,925	
\$ 5.18		\$ 5.67	
4.92		5.95	
\$.26		\$ (.28)	
.58		.18	
\$ (.32)		\$ (.46)	

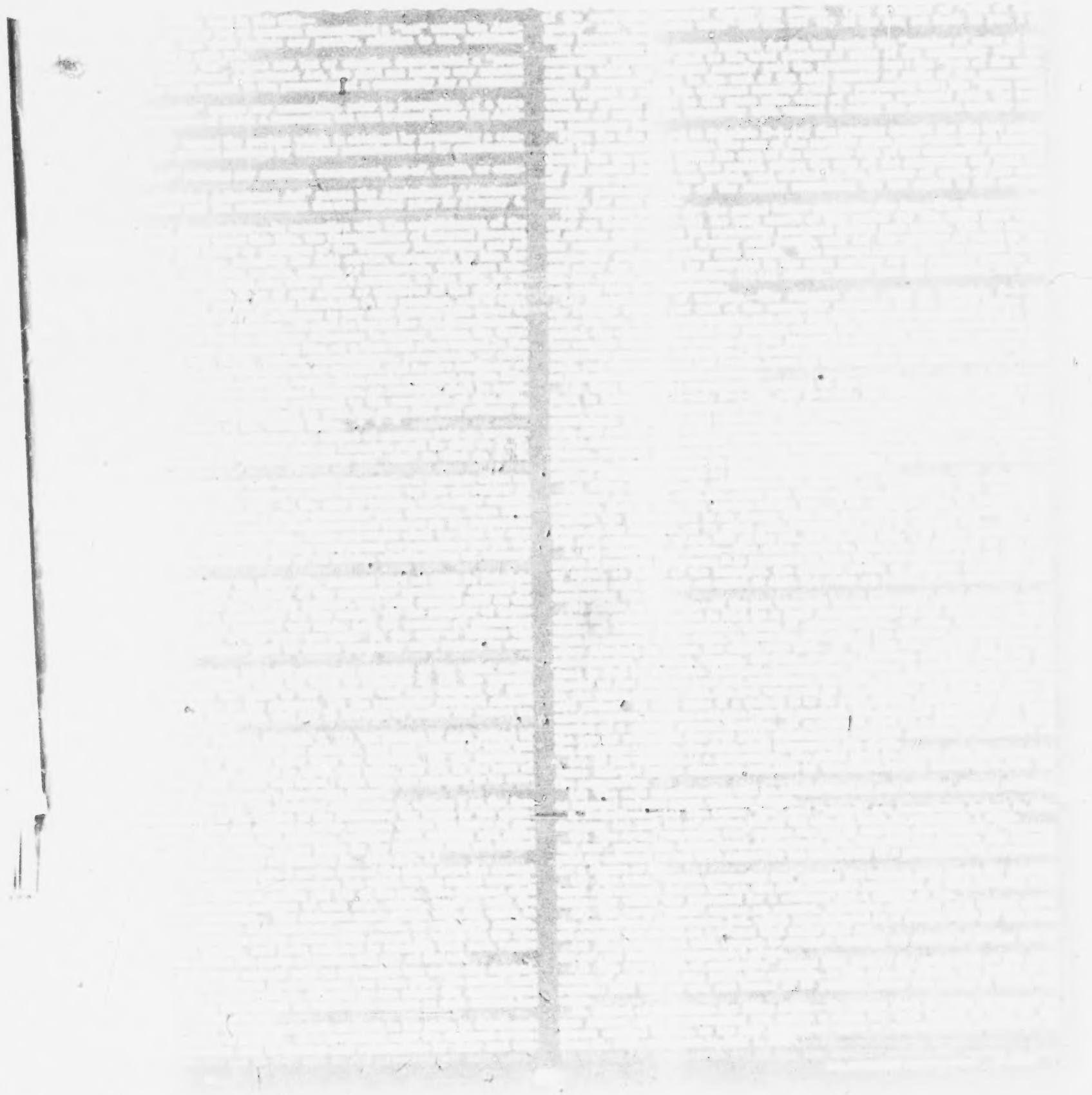
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A black and white photograph of a brick wall. A vertical metal rod or pipe runs through the center of the wall, extending from the top to the bottom of the frame. The wall is constructed of bricks with visible mortar joints. There are some horizontal lines or bands across the wall, possibly from a window or a different section of the wall. The image is somewhat grainy and has a high-contrast, almost stencil-like appearance.









Filed 12:35 P.M. Aug 11 1941

United States Processing Tax
Board of Review RUNITED STATES PROCESSING TAX BOARD
OF REVIEWWEBRE STEIB COMPANY, LTD.,
Petitioner,

v.

COMMISSIONER OF INTERNAL
REVENUE,

Respondent.

Docket No. 389

ANSWER

Comes now the respondent, by his attorney, J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue, and, for answer to the petition filed in the above-mentioned proceeding, admits, denies and alleges as follows:

I. Admits the allegations contained in paragraph I of the petition.

II. Admits the allegations contained in paragraph II of the petition.

III. Admits the allegations in the first sentence of paragraph III of the petition. Answering the second and/or last sentence of paragraph III of the petition, respondent denies that the processing tax paid by petitioner amounts to \$8,169.97, but admits that the claim for refund involves processing taxes for the period commencing October 1, 1934, and ending November 30, 1935, except that respondent alleges that the petitioner paid no processing tax for the months of January, February, March, April, May, June, July, August and September, 1935.

IV. (a) Denies that he committed error as alleged in paragraph IV(1) of the petition.

(2) Denies that he committed error as alleged in paragraph IV(2) of the petition.

(3) Denies that he committed error as alleged in paragraph IV(3) of the petition.

(4) Denies that he committed error as alleged in paragraph IV(4) of the petition.

V. (a) Denies that the processing tax paid during the period October 1, 1934, and ending November 30, 1935, amounted to \$8,169.97, as alleged in paragraph V(a) of the petition.

(b) Admits that the processing tax paid by petitioner was paid on sugar, as alleged in paragraph V(b) of the petition.

(c) Admits the allegations contained in paragraph V(c) of the petition.

(d) Admits the allegations contained in paragraph V(d) of the petition.

(e) Denies the allegations contained in paragraph V(e) of the petition.

(f) Denies the allegations contained in paragraph V(f) of the petition.

(g) Denies the allegations contained in paragraph V(g) of the petition.

(h) Admits the allegations contained in paragraph V(h) of the petition.

(i) Respondent alleges that the allegations contained in paragraph V(i) of the petition are so irrelevant and immaterial to the issue involved as to require no answer, but, if the Board considers otherwise, then respondent avers that he is without sufficient knowledge and information upon which to form a belief as to the correctness of said allegations, and therefore denies the same for the purpose of this answer.

(j) Respondent alleges that he is without sufficient knowledge and information upon which to form a belief as to the correctness of the allegations contained in paragraph V(j) of the petition, and therefore denies the same.

(k) Respondent alleges that he is without sufficient knowledge and information upon which to form a belief

as to the correctness of the allegations contained in paragraph V(k) of the petition, and therefore denies the same.

(l) Respondent alleges that he is without sufficient knowledge and information upon which to form a belief as to the correctness of the allegations contained in paragraph V(l) of the petition, and therefore denies the same.

(m) Respondent alleges that he is without sufficient knowledge and information upon which to form a belief as to the correctness of the allegations contained in paragraph V(m) of the petition, and therefore denies the same.

(n) Denies the allegations contained in paragraph V(n) of the petition.

(o) Respondent alleges that he is without sufficient knowledge and information upon which to form a belief as to the correctness of the allegations contained in paragraph V(o) of the petition, and therefore denies the same.

VI. Paragraph VI. of the petition contains a request that a hearing on the merits be held at New Orleans, Louisiana, which is a matter within the discretion of the Board, and requires no answer.

VII. Denies generally and specifically each and every allegation contained in the petition not hereinabove admitted, qualified or denied.

WHEREFORE, it is prayed that the Board find that the petitioner is not entitled to a refund of the amount claimed herein, or any amount whatsoever.

Signed J. P. Wenchel
J. P. WENCHEL,
Chief Counsel,
Bureau of Internal Revenue,
Attorney for Respondent.

OF COUNSEL:

Raymond F. Brown,
Royal E. Maiden, Jr.,
Special Attorneys,
Bureau of Internal Revenue.

REM,Jr-k 8-9-41

UNITED STATES PROCESSING TAX BOARD
OF REVIEW

WEBRE STEIB COMPANY, LTD., Petitioner, v. COM-
MISSIONER OF INTERNAL REVENUE, Respondent.

Docket No. 389.

Decided November 24, 1942.

C. J. Batter, Esq., for the petitioner.
Homer F. Benson, Esq., for the respondent.

This proceeding was brought to review the disallowance by the respondent of the petitioner's claim, filed under Title VII, Revenue Act of 1936, for the refund of processing tax paid under the provisions of the Agricultural Adjustment Act, as amended, in the amount of \$8,169.97.

The ultimate issue for solution is whether the petitioner bore the burden, in whole or in part, of the processing tax paid by it under the provisions of the Agricultural Adjustment Act, as amended, and if so, to what extent. The points of dispute between the parties pertain mainly to the (a) failure on the part of the petitioner to include in the computation of its statutory margin certain crop benefit payments received by the petitioner with respect to its 1934 and 1935 crop years, which the respondent contends should be applied against and in the reduction of the cost of the commodity as used in such margin calculation; (b) whether or not the units of the commodity, for the purpose of computation of the tax period margin, should be tons of sugarcane, as contended by the petitioner, or its equivalent in raw sugar, as contended by the respondent; (c) the introduction and attempted use on the part of the petitioner of a period, for margin comparison, subsequently to the period after the tax as defined by the statute; and (d) whether the sugar amendment to the Agricultural Adjustment Act was designed to, and in fact did, prevent the shifting of the burden of the tax, as urged by the petitioner.

This proceeding having been heard by the Board, the Board, upon the evidence adduced, makes the following

FINDINGS OF FACT

1. The petitioner, a corporation, organized and incorporated under the laws of the State of Louisiana, with its principal office at Vacherie, Louisiana, is and was during the entire period here under consideration engaged in the operation of a plantation, growing of sugarcane thereon, purchasing sugarcane from others, and in the processing of such sugarcane into direct-consumption (centrifugal) sugar and edible molasses, and was a processor of the basic agricultural commodity, sugarcane, directly resulting in direct-consumption sugar, within the meaning of the Agricultural Adjustment Act, as amended.

2. The sugarcane acquired by the petitioner was purchased on a competitive basis from a plantation two and a half miles distant. Its own plantation comprised approximately 580 acres under cultivation. Cane seeds were planted in September and October of each year and the crops resulting from those plantings were harvested between October and the close of the year following, or shortly thereafter. Both its own-grown sugarcane and that acquired from others was then ground in its own mill, producing a low grade of crystal white direct-consumption sugar and edible molasses by what is known as the sulphuration process which is continuous for sugarcane to the finished product, there being no intermediate stage at which raw sugar, as such, is produced. The 1932 to 1936 crops were processed in the following periods:

1932	October 17 to December 30, 1932
1933	" 23 to " 7, 1933
1934	" 29 to " 13, 1934
1935	" 29 to " 6, 1935
1936	" 27 to January 3, 1937

3. Although the sugar produced by the petitioner was of low grade, it was of a slightly higher grade than raw sugar because of its pulverizing qualities. Due to its tendency to revert to liquid form with the advent of warm

weather, however, it was necessary to market its product as soon after processing as possible, usually not later than May of each year following the grinding season.

During the first several months of 1932 its sugar was sold to householders. This proved unsuccessful because of the moisture content of the product, so that, thereafter, and ever since, its sale in 100 pound sacks, has been limited to large consumers such as candy, cake, and similar manufacturers. All sales were through brokers, upon sample, in the open market and in the competition with other manufacturers in the vicinity who marketed their products at the same time. Because of its inferior quality such sales were on a basis averaging 80 cents below the price of standard refined sugar. Molasses was sold in 50 to 56 gallon barrels to certain manufacturers for further treatment and resale.

4. The yield of sugar per ton of cane varies according to the sucrose content thereof. The standard yield of cane is $11\frac{1}{2}$ percent, but will, as was the experience of the petitioner, vary between standard and 16 percent. Prior to the 1934 crop the petitioner determined its average yield of sugar per ton of cane processed merely by taking the total actual production of all cane processed and sugar produced and its purchase of cane were made upon a tonnage basis of sugarcane, applying raw sugar prices on the New Orleans market. The sucrose content must be determined by chemical test and it is only by this method that the yield of a particular ton of cane can be accurately found. The petitioner employed a chemist in 1934 for that purpose. In 1934, 1935, and 1936, yield was determined by chemical test and purchases of cane were made with the added factor of sucrose content. Of the total tax and interest paid, \$7,067.12 was paid on sugar, and \$1,102.85 on molasses.

5. In December 1934 the petitioner, as a producer of sugarcane, entered into a Sugarcane Production Adjustment contract under the Agricultural Adjustment Act, as amended, by which it undertook to have its base production established by the Secretary of Agriculture and

its production allotted thereunder, and having thereafter duly executed a certificate of compliance and a certificate of performance, the United States paid and the petitioner received benefits thereunder on the following dates and in the following amounts:

February 26, 1935, under Sec. 15b	
of said contract	\$ 6,863.30
October 16, 1935, under Sec. 15c	
of said contract	5,641.56
October 16, 1935, under Sec. 16a	
of said contract	3,499.02
November 16, 1935, under Sec. 16b	
of said contract	6,196.53
	<hr/>
	\$22,200.11

No payments were made, however, by the Secretary of Agriculture to the petitioner or to any grower from whom the petitioner purchased sugarcane under Section 8, Par. 7 of the Agricultural Adjustment Act, as amended.

6. Due to the excess supply of sugar in the various producing countries, including large stocks in the United States, at the outset of 1933, the decline just described was not unusual, but rather was expected. In consequence, early in that year, the refiners, beet processors and growers, Louisiana, Cuban, Puerto Rican, Hawaiian and Philippian sugar interests attempted, with the tentative approval of the Department of Agriculture, to negotiate a stabilization agreement directed toward controlling supplies of sugar. These negotiations had the effect of reducing the supply of sugar for market, and had the corresponding effect of creating an increase in the price of raw and refined sugar—raw sugar having advanced from approximately \$2.80 to approximately \$3.65 in mid-September of 1933. On or about September 15, 1933, it became evident that these plans for stabilization would be abandoned, and in consequence the supplies of sugar which had been held in check by the prospect of that agreement would now be, and in fact were, released.

There was a steady decline in refined sugar prices—with one slight interruption—from the peak in August-September, 1933, of approximately \$4.70 until the first week in June, 1934. This decline was due to a decline in raw sugar prices from a peak of approximately \$3.65 in mid-September to approximately \$2.80 just prior to the imposition of the processing tax on sugar by the Jones-Costigan Sugar Act, approved May 9, 1934, made effective June 8, 1934.,

A further contributing factor was that this condition coincided with the beginning of processing of the new beet crop, which, in the Fall of 1933 produced 1,600,000 tons of sugar, or more than 300,000 tons more than has ever been produced in any prior year.

Universal increases in the sale price of sugar were effected on the effective date of the Jones-Costigan Amendment to the Agricultural Adjustment Act, hereinabove referred to, by \$.55 a hundred pounds, to cover the amount of tax imposed by said amendment to the act.

7. The petitioner's statutory tax period began June 8, 1934 and ended on November 8, 1935. During the months of October, November, and December, 1934 and October and November, 1935, it prepared and duly filed processing tax returns with the Collector of Internal Revenue for its district and paid the amount of processing tax shown to be due thereon, aggregating \$8,168.74, plus interest thereon of \$1.23, none of which amount has been refunded to it.

8. The petitioner filed a claim on P. T. Form 79 with the Collector of Internal Revenue for the District of Louisiana on June 20, 1938 for the refund of \$8,169.97, and as prescribed therein computed average statutory margins (using the months in which it actually engaged in processing and using as a basis, pounds, raw sugar value) for the tax period and for the period before and after the tax, showing an average margin of \$.003329 greater for the tax period than for the period before and after the tax. The Commissioner's notice of disallowance

of such claim, in whole, was sent by registered mail to the petitioner on April 10, 1941, and a petition for review of such disallowance was filed with the Board on July 1, 1941.

9. The total number of units of the commodity processed by the petitioner in the tax period was 2,256,676 pounds of sugar, 96 degrees raw value; the gross sales value of all articles processed by the claimant from such commodity was \$75,055.63; the cost of the commodity processed during the tax period was \$39,982.44, and the processing tax and interest paid with respect thereto was \$8,169.97. The average statutory margin for the tax period was \$.01192.

10. The total number of units of the commodity processed in the base period was 5,444,064 pounds of sugar, 96 degrees raw value; the gross sales value of all articles processed from such commodity was \$161,853.86, and the cost of the commodity processed was \$88,151.60. The average statutory margin for the base period was \$.01354.

11. The average margin per unit of the commodity processed was \$.00162 lower in the tax period than it was during the base period.

12 All of the accounts stated between the petitioner and its broker, E. A. Rainold, Inc., respecting sales of molasses made through that broker included the processing tax as a separate item and as an addition to the sale price of the article. An account sale, typical of all such accounts, respecting the sales of sugar, made through its said broker, bore the following:

Golden Ridge, 100 Pkts. 10,000# @3.71¢ \$371.00
F. O. B. Pltn, Tax Pd.
Tax 0.526¢

The figures 0.526¢ was the prevailing rate of processing tax at or about the time of the rendition of said account.

The following paragraph is from a copy of a letter of E. A. Rainold, Inc., addressed and, purportedly mailed, to the petitioner on January 17, 1936:

"According to memorandum you furnished us on processing tax you paid on 298,017 pounds of sugar, and we have accounted to you for there [three] cars of 800 pockets and part car of 300 pockets and when we get paid for the balance of this part car, or 500 pockets, it will total 3200 pockets or 320,000# on which the processing tax was included in the price. Therefore you have not paid anymore tax than you collected and these sugars in warehouse here and elsewhere, that is Chicago, or [are] really tax free."

13. The petitioner has no understanding or agreement written or oral by which it might be relieved of the burden of the processing tax, reimbursed therefor, or by which it might shift the burden thereof to another. Nor is there any person who directly or indirectly controls it or who is directly or indirectly controlled by it through whom it might be relieved of the burden of the tax, reimbursed therefor, or through whom it might shift the burden of the tax to another.

14. The extent to which the processing tax paid and borne by the petitioner and not shifted to others in any manner whatsoever is \$3,655.82.

DECISION

The petitioner is entitled to a refund in the amount of \$3,655.82, being the amount of processing tax paid by it upon the first domestic processing of sugarcane, the burden of which was borne by it and not shifted to others.

• Reviewed by the Board.

(Signed) Temple W. Seay
 TEMPLE W. SEAY,
 Member.

Crews took no part in the consideration or decision of this proceeding. Edwards dissents.

MEMORANDUM

The respondent contends that the \$22,200.11, representing an amount received by the petitioner under a Sugarcane Production Adjustment contract entered into

between the petitioner and the Secretary of Agriculture in 1934, should be included in the computation of the statutory margin in the reduction of the cost of the commodity in the tax period, his theory being that such payments relate to the production of its own-grown sugarcane and that, therefore, the cost of that production should be reduced accordingly.

The petitioner contends, of course, that such amount should be excluded and argues that crop benefit payments bear no relation whatsoever to the production of sugarcane. In other words, it is argued, the payment was in consideration of the petitioner's promise to adjust its production to conform to the requirements and domestic needs as determined by the Secretary of Agriculture—a subsidy payment for refraining from, rather than for, production. Irrespective of the merits of the pros and cons of the parties, it would seem, in the first place, that Section 907 of the statute, defining the cost of commodity, would resolve the question in favor of the petitioner; and in the second place, even though it should be included in the statutory margin, under the rebuttal provisions of that section, it would necessarily be excluded as a factor "other than the tax." Subdivision (e) (1), Section 907, Revenue Act of 1936: *E. Regensburg & Sons v. Commissioner of Internal Revenue* (C.C.A. 2d) (Decided August 3, 1942).

The cost of commodity is, "the actual cost of the commodity processed", or, "the product computed by multiplying the quantity of the commodity processed by the current prices at the time of processing for commodities of like quality and grade". Section 907 *supra*. There is no statutory justification for the inclusion of anything in the cost of the commodity defined therein other than "the actual cost of the commodity", or the "current prices at the time of processing". Therefore, crop benefit payments have been excluded from the margin calculation.

In the preparation of its claim for refund of the processing tax, here in controversy, the petitioner used raw sugar as the units of the commodity processed in both the tax period and in the period before and after the tax.

At the hearing it departed from this basis, offering in lieu of pounds of sugar, raw value, the tons of sugarcane from which such sugar was produced, which, the respondent contends, can not be done.

Section 9 (a) of the Agricultural Adjustment Act, as amended, provided that "The processing tax shall be levied, assessed, and collected upon the first domestic processing of the commodity, * * *".

Subsection (9) of that section defines the term "first domestic processing" to mean "each domestic processing, including each processing of successive domestic processings, of sugar beets, sugarcane, or raw sugar, which directly results in direct-consumption sugar". Subsection (b) (8) of that section provides that "In the case of sugar beets or sugarcane the rate of tax shall be applied to the direct-consumption sugar, resulting from the first domestic processing, translated into terms of pounds of raw value according to regulations to be issued by the Secretary of Agriculture, * * *". Subsection 9 (d) (6) (G) of that section provides that:

"The term 'raw value' means a standard unit of sugar testing ninety-six sugar degrees by the polariscope. All taxes shall be imposed and all quotas shall be established in terms of 'raw value' and for purposes of quota and tax measurements all sugar shall be translated into terms of 'raw value' according to regulations to be issued by the Secretary, * * *".

The Secretary of Agriculture promulgated sugar regulations, Series 1, in June, 1934, approved by the President June 4, 1934, and Series 1, No. 1, approved June 18, 1935, in which the rate of processing tax, definitions, conversion factors, etc. were provided for. So that, it will be seen, raw value was the basis for the imposition of the processing tax, and was the basis upon which the petitioner filed its returns and paid its tax to the Collector of Internal Revenue.

Section 907 of the Revenue Act of 1936, the act providing for the refund of the processing tax so paid, after providing for the manner in which margins should be computed, provides that "The sum so ascertained shall be divided by the total number of units of the commodity processed * * *". The act itself does not define the words "units of the commodity processed". Regulations 96 promulgated pursuant to Title VII, Revenue Act of 1936, provides that "In determining the average margin for the tax period, the 'number of units of the commodity processed' shall be the number of units of the commodity with respect to which the claimant actually paid the processing tax; * * *". Thus, the basis of the claim for refund provided for is the same as the basis upon which the tax was levied and collected—raw sugar value—and is also the basis of the petitioner's claim.

There is no authority for now departing from the basis upon which the tax was paid and upon which the claim for refund of the tax was prepared and filed.

The petitioner contends that the statutory base period (two years before the tax and the six months, February to July, inclusive, 1936) is not a comparable period to the tax period for the purpose of determining the burden borne by it, and it substitutes for such period, a calculation for the period October 27, 1936 to January 3, 1937, which, by comparison with the tax period statutory margin calculation, reveals that the petitioner bore the burden of a greater amount of tax, by \$1,131.14, than it actually paid.

Notwithstanding the petitioner refers to the substitution as "rebuttal", the name by which it is called can not change its character from an attempt to select an arbitrary, and of course, more favorable period to the petitioner for the period laid down by the statute. The Congress, in Section 907 of the Revenue Act of 1936, has defined the "tax period" to mean "the period with respect to which the claimant actually paid the processing tax to a collector of internal revenue and shall end on the date with respect to which the last payment was made.",

and for the purpose of a comparison with that period—and this is the only comparison provided for in the statute—it established a “period before and after the tax”, which it defined as meaning “the twenty-four months * * * immediately preceding the effective date of the processing tax, and the six months, February to July, 1936, inclusive.” It would seem, therefore, that any “rebuttal” provided for by that section of the statute should be addressed and related to that period and should not take the form of a similar calculation which includes a much shorter period of comparison, and a period obviously selected because it favors the desired result.

For the reason that this proof establishes nothing more than that the selection of a different period than that provided for by the statute would produce a different result, and because it tends in no way to establish either a prima facie case under the statute or to rebut the prima facie case established by other proof, no finding of fact has been predicated thereon.

The petitioner contends that the Sugar Amendment to the Agricultural Adjustment Act was designed and administered to prevent the passing on of the tax to the consumer and to prevent the passing back of the tax to the producer, and that the Secretary of Agriculture, by failing to make compensating payments to the growers from whom the petitioner purchased cane found, as a fact, that the tax was not borne by the grower. Irrespective of what might have been the purpose of the amendment, and what evidentiary weight might be given to the failure of the Secretary of Agriculture to make compensating payments to growers from whom petitioner purchased cane, the uncontradicted fact is that actually the burden of the tax was shifted by this petitioner with respect to its sales of molasses by the inclusion thereof in its invoices as a separate item, and as an addition to the sale price of the article. Furthermore, the proof is that at the first moment of the effective date of the imposition of the processing tax upon sugar, there were universal increases in the sugar industry by \$.55 a hundred pounds, to cover the amount of tax imposed by that amendment.

The reasonable inference to be drawn from this fact is that the petitioner, in competition with the industry, joined in those universal increases and that, at least, for a time, was able to, and in fact did, shift the burden of the processing tax to the consumer. Furthermore, there seems to be a contradiction in the petitioner's argument that the Secretary of Agriculture, by failing to make compensating payments to growers, establishes as a fact that the tax was not borne by the grower when we weigh that argument in the light of Section 8, paragraph (7) of the Agricultural Adjustment Act, as amended, which reads as follows:

"In the case of sugar beets or sugarcane, in the event that it shall be established to the satisfaction of the Secretary of Agriculture that returns to growers or producers, under the contracts for the 1933-1934 crop of sugar beets or sugarcane, entered into by and between the processors and producers and/or growers thereof, were reduced by reason of the payment of the processing tax, and/or the corresponding floor stocks tax, on sugar beets or sugarcane, in addition to the foregoing rental or benefit payments, the Secretary of Agriculture shall make such payments, representing in whole or in part such tax, as the Secretary deems fair and reasonable, to producers who agree, or have agreed, to participate in the program for reduction in the acreage or reduction in the production for market, or both, of sugar beets or sugarcane."

Why, if the Sugar Amendment to the Agricultural Adjustment Act was to prevent the backward shift of the tax to the producer, should the Congress, at the same time, have recognized that such a shift was possible, and therefore, in the aforesaid section provided, that in the event of a showing that the returns to growers or producers were reduced, by reason of the payment of the processing tax or floor stocks tax, that "in addition to the foregoing rental or benefit payments, the Secretary of Agriculture shall make such payments, representing in

whole or in part such tax"? In other words, if the act was designed to prevent the passing back of the tax to the growers, why should the Congress, at the same time, provide for that contingency and provide payments to compensate those growers in such event? Since this proposed proof on the part of the petitioner appears wholly contradictory and without foundation in fact, no fact has been predicated thereon.

(Signed) Temple W. Seay

TEMPLE W. SEAY,
Member.

Filed 3:10 p.m. Dec 30 1942

United States Processing Tax
Board of Review Ru

UNITED STATES PROCESSING TAX BOARD
OF REVIEW

WEBRE STEIB COMPANY, LTD.,
Petitioner,

v.

COMMISSIONER OF INTERNAL
REVENUE,

Respondent.

} Docket No. 389

MOTION FOR REHEARING, RECONSIDERATION
AND REDETERMINATION.

COMES NOW the respondent, by his attorney, J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue, and moves (1) that the Board vacate and set aside its decision promulgated in the above-entitled proceeding on November 24, 1942; (2) that the Board rehear and redetermine the issue involved herein upon the basis of the record already made; and (3) that the Board determine that the

petitioner was relieved of and shifted its entire processing tax burden to others and is entitled to no refund under the facts and the law in the proceeding.

The grounds upon which this motion is based are as follows:

I. The Board erred in failing to give effect in whole or in part to the benefit payments received by petitioner under its Sugar Cane Production Adjustment Contract in computing the statutory cost of commodity for the tax period.

II. The Board erred in failing to find that the petitioner's statutory average margin for the tax period exceeded and was greater than its statutory average margin for the base period.

III. The Board erred in failing to find that the uncontradicted evidence in the record establishes that the petitioner actually shifted its entire processing tax burden to others through the inclusion thereof in the selling prices received for its sugar products.

IV. The Board erred in failing to find that the petitioner was relieved of its entire processing tax burden within the meaning and intendment of section 902 of the refund statute through the receipt by it of benefit payments under the Agricultural Adjustment Act, as amended, in the aggregate amount of \$22,200.11.

V. The Board erred in finding that the petitioner bore the burden of its total processing tax payments to the extent of \$3,655.82.

VI. The Board erred in failing to find that the petitioner did not bear any part of its total processing tax burden under the facts and the law in the proceeding.

This motion is made pursuant to Rule 27 of the Rules of Practice before the United States Processing Tax Board of Review.

In support hereof, the respondent submits the attached memorandum.

WHEREFORE, it is prayed that this motion be granted.

Signed J. P. Wenchel
RFB
J. P. WENCHEL,
Chief Counsel,
Bureau of Internal Revenue,
Attorney for Respondent.

OF COUNSEL:
Raymond F. Brown,
Homer F. Benson,
R. E. Maiden, Jr.,
Special Attorneys,
Bureau of Internal Revenue.
REM,JR./MMc 12-28-42.

Filed 10:25 a.m. Dec 30 1942
United States Processing Tax
Board of Review Ru

UNITED STATES PROCESSING TAX BOARD
OF REVIEW

WEBRE STEIB COMPANY, LTD.,
Petitioner,

v.

COMMISSIONER OF INTERNAL
REVENUE,

Respondent.

} Docket No. 389

MOTION FOR REHEARING

WHEREAS this Board on November 24, 1942 promulgated its Findings of Fact and Decision in the above-entitled cause, and the petitioner believes that the Board erred in some of the facts and the application of the law, therefore

NOW comes the petitioner, by its counsel, C. J. Batter, and moves the Board to grant a rehearing in the above-entitled cause, and gives as reasons therefor:

THAT the Board erred in finding certain facts and failing to find other facts, all as set forth later herein; and

THAT the Board erred in its application of the law by excluding the 1936 crop period from consideration in deciding the issues, for the reason hereinafter set forth.

The petitioner respectfully submits that the Board erred in regard to the facts in the following particulars:

(a) In findings No. 10 and No. 11 the Board refers to the period before the tax as the "base period" when, in fact, the entire contents of those findings relate only to the period two years before the tax (Pet. Exh. 13-c).

(b) The Board erred in failing to find as a fact that petitioner did no processing during the period six months after the tax, that is, February to July, 1936, inclusive (Pet. Exh. 13(c)).

(c) The Board erred in failing to find that the total number of units of the commodity processed in the period October 1936 to January 1937—the first processing after the tax period—was 2,958,064 pounds of sugar, 96° raw value (Stip. par. 3); the gross sales value of all articles processed from such commodity was \$99,119.55, and the cost of the commodity processed was \$52,323.85 (Pet. Exh. 16(b)). The average statutory margin for the 1936 crop, processed during the period October 1936 to January 1937, was \$.01582.

The petitioner respectfully submits that the Board erred in its application of the law to the facts by.

(a) Failing to hold that, based on the Board's finding No. 6 the period two years before the tax was not a period comparable with the tax period in every respect, excepting the tax, and that such period should therefore be excluded from the margin computation (cf. *Epstein*

v. Helvering, 120 Fed (2d) 427, and *Arkwright Mills, Inc. v. Commissioner*, 127 Fed. (2d) 465).

(b) Failing to hold that the period October 1936 to January 1937—during which period the 1936 crop was processed, being the first processing after the tax period—a period almost equal in length to the tax period (Pet. Exh. 13(b)), was a period in which all the factors except the tax were the same as during the tax period, and that such period rebutted all presumptions and established the fact that the petitioner bore the entire burden of the tax.

(c) In the alternative, failing to hold that since the petitioner did no processing during the period six months after the tax, the period of processing the 1936 crop should be included in the statutory period (cf. *Epstein v. Helvering*, 120 Fed (2d) 427 and *Arkwright Mills, Inc. v. Commissioner*, 127 Fed. (2d) 465).

(d) The Board erred in its decision insofar as the foregoing application of law changes the result.

THEREFORE, the petitioner prays that this motion be granted and that it be allowed time for the filing of a brief until February 20, 1943, and that subsequent to that date the Board set the matter down for hearing.

(s) C. J. Batter

C. J. BATTER
902 American Security Bldg.
Attorney for Petitioner
Washington, D. C.

THE TAX COURT OF THE UNITED STATES

WEBRE STEIB COMPANY, LTD.,
Petitioner,

v.

COMMISSIONER OF INTERNAL
REVENUE,
Respondent.

Docket No. 389 P.T.

ORDER

The Processing Tax Board decided on November 24, 1942, that the petitioner is entitled to a refund in the amount of \$3,655.82. The petitioner filed a motion for rehearing on December 30, 1942, and the respondent likewise filed a motion for rehearing, reconsideration, and redetermination on that same date. The petitioner renewed his motion before this Court by filing a new motion on January 2, 1943. The parties were heard on February 10, 1943. It appears that all of the arguments advanced by them have been considered by the Processing Tax Board in reaching its decision, and we find in those arguments no reason for a rehearing, reconsideration, or redetermination. It is

ORDERED, that the three motions above referred to are denied.

(Signed) J. E. MURDOCK
Judge

Dated—Washington, D. C.
February 11, 1943.

(SEAL)

Received Apr 29 1943
The Tax Court of the U. S.

The Tax Court of the United States
Filed Apr 21 1943

IN THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE FIFTH CIRCUIT

GUY T. HELVERING, Commissioner of Internal Revenue,	}	No. 10641
Petitioner on Review,		
v.		
WEBRE STEIB COMPANY, LTD.,	}	
Respondent on Review.		

T.C. Docket No. 389 P.T.

PETITION FOR
REVIEW AND ASSIGNMENT OF ERROR

To the Honorable Judges of the United States Circuit Court of Appeal for the Fifth Circuit:

COMES NOW, Guy T. Helvering, Commissioner of Internal Revenue, by his attorneys, Samuel O. Clark, Jr., Assistant Attorney, J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue, Raymond F. Brown, Special Attorney, Bureau of Internal Revenue, and Royal E. Maiden, Jr., Special Attorney, Bureau of Internal Revenue, and respectfully shows:

I.

That he is the duly appointed, qualified and acting Commissioner of Internal Revenue, appointed and holding office by virtue of the laws of the United States; that the Webre Steib Company, Ltd., (hereinafter referred to as the claimant), the respondent on review, is a corporation organized and incorporated under the laws of the State

of Louisiana, with its principal office and place of business at Vacherie, Louisiana, which is within the jurisdiction of the United States Circuit Court of Appeals for the Fifth Circuit.

The Court in which the review in this proceeding is sought is the United States Circuit Court of Appeals for the Fifth Circuit, which Court has jurisdiction to review the decision of the United States Processing Tax Board of Review in the instant proceeding by virtue of section 906(g), Title VII of the Revenue Act of 1936, 49 Stat. 1750 (U.S.C. 1940 ed., title 7, sec. 648).

The decision of the United States Processing Tax Board of Review was promulgated on November 24, 1942, wherein it was held that the claimant is entitled to a refund of \$3,655.82.

Following the aforesaid decision of the United States Processing Tax Board of Review, and within the 45 days provided by said Board's rules for filing a motion for rehearing, to-wit, on December 30, 1942, the Commissioner of Internal Revenue, the petitioner on review herein, filed with said Board a motion for rehearing, reconsideration and redetermination.

The United States Processing Tax Board of Review, effective as of the close of business on December 31, 1942, was abolished and its jurisdiction transferred to the United States Board of Tax Appeals, now The Tax Court of the United States, by section 510 of the Revenue Act of 1942, 56 Stat. 967. Section 510(k) of said Act provides as follows:

"SAVING PROVISIONS.—Section 906(g) of the Revenue Act of 1936, as in effect prior to the date of enactment of the Revenue Act of 1942, shall remain in effect as to petitions to review decisions of the Board of Review rendered prior to January 1, 1943, but shall not, if any case involving any such petition is remanded for further proceedings in the Board of Tax Appeals, remain in effect with respect to any further proceedings in such case."

Effective on the day after the date of enactment of the Act, the name of the United States Board of Tax Appeals was changed to "The Tax Court of the United States" by section 504 of the Revenue Act of 1942, 56 Stat. 957, enacted October 21, 1942.

The United States Processing Tax Board of Review, with the exception of receiving and filing the aforesaid motion for rehearing, reconsideration and redetermination of its decision of November 24, 1942, filed by the Commissioner of Internal Revenue on December 30, 1942, took no action with respect to said motion for rehearing, reconsideration and redetermination prior to its abolishment and the transfer of its jurisdiction to The Tax Court of the United States, as aforesaid. Thereafter, to-wit, on February 11, 1943, The Tax Court of the United States entered an order in this proceeding denying the Commmissioner's said motion for rehearing, reconsideration and redetermination.

II.

The nature of the controversy is as follows, to-wit:

The claimant during the entire periods here under consideration was engaged in the operation of a plantation, the growing of sugar cane thereon, the purchasing of sugar cane from others and the processing of such sugar cane into direct-consumption sugar (refined sugar) and edible molasses, and was a processor of the basic agricultural commodity, sugar cane, within the meaning of section 9(d) (6) of the Agricultural Adjustment Act, as amended by section 2 of the Act, approved May 9, 1934. During the months of October, November and December, 1934, the month of October 1935, and the first eight days of the month of November 1935, the claimant processed sugar cane into direct-consumption sugar (refined sugar) and edible molasses, on the processing of which it paid to the Collector of Internal Revenue for the District of Louisiana the sum of \$8,168.74 (plus interest of \$1.23) as processing tax under the Agricultural Adjustment Act, as amended.

The claimant filed an original claim on P.T. Form 79 with the Collector of Internal Revenue for the District of Louisiana on June 30, 1937, for the refund of \$8,169.97. Thereafter, on June 30, 1938, the claimant filed an amended claim for refund in the amount of \$8,169.97, and as prescribed therein computed average statutory margins (using the months in which it actually engaged in processing and using, as units of commodity processed, pounds of raw sugar, 96 degree value) for the tax period and for the period before and after the tax, showing an average margin of \$0.003329 greater for the tax period than for the period before and after the tax. Said claim for refund, as amended, was filed under the provisions of Title VII of the Revenue Act of 1936, 49 Stat. 1747-55 (U.S.C. 1940 ed., title 7, secs. 644-659).

The Commissioner of Internal Revenue by registered letter dated April 10, 1941, disallowed in full the claimant's aforesaid claim for refund, as amended.

Under date of July 1, 1941, the claimant filed a petition with the United States Processing Tax Board of Review for a review of the disallowance of its claim for refund, as amended, and for a hearing on the merits thereof, to which petition the Commissioner of Internal Revenue duly filed his answer on August 11, 1941.

In its decision the United States Processing Tax Board of Review (hereinafter referred to as the Board) held that, in computing the statutory cost of commodity (section 907 (b) (5) of the Revenue Act of 1936), the actual cost for the tax period of the claimant's own-grown cane should not reflect the applicable portion of the crop benefit payments received by the claimant during 1935, under the provisions of the Agricultural Adjustment Act, as amended, in the aggregate amount of \$22,200.11, with respect to its 1934 and 1935 crops of sugar cane. On the basis of eliminating the applicable portion of the aforesaid crop benefit payments in computing the statutory cost of commodity for the tax period, the Board

found that the result of a comparison of the claimant's "average margin" for the statutory "tax period" with its "average margin" for its statutory "period before and after the tax" (as defined in section 907(b) of the Revenue Act of 1936) reflected that the claimant's average margin for the tax period was lower than its average margin for the period before and after the tax (the so-called "base" period) in the amount of \$0.00162 per unit (pound of raw sugar, 96 degree value). In accordance with the provisions of section 907(a) of the Revenue Act of 1936, it is "prima facie evidence" that the claimant bore the burden of the processing tax paid by it to the extent that its average margin for the tax period was lower than its average margin for the period before and after the tax. On the basis of the aforesaid margin comparison, giving rise to the presumptive extent to which the claimant shifted its processing tax burden, the Board found that the claimant is entitled to a refund of 3,655.82. The Board gave no effect to the facts showing the actual extent to which the claimant shifted its processing tax burden, adduced by the Commissioner of Internal Revenue under the specific authority of section 907(e) (2) of the Revenue Act of 1936, holding that such facts were not sufficient to rebut and overcome the presumption arising from the margin comparison which was found by the Board to be favorable to the claimant in the amount of \$3,655.82. Further, the Board ignored, both in determining the statutory margin showing and as rebuttal of the presumption arising thereunder, the fact that the claimant received crop benefit payments during 1935, under the provisions of the Agricultural Adjustment Act, as amended, in the aggregate amount of \$22,200.11.

III.

The Commissioner of Internal Revenue, being aggrieved by the decision of the United States Processing Tax Board of Review, as aforesaid, together with the findings of fact and conclusions of law upon which the same is based, desires to obtain a review of the Board's

decision by the United States Circuit Court of Appeals for the Fifth Circuit, and files this petition for review under the provisions of section 906(g) of the Revenue Act of 1936, *supra*.

The assignments of error of the Commissioner of Internal Revenue, the petitioner on review herein, are as follows:

1. The United States Processing Tax Board of Review erred in holding, finding and deciding that the cost of commodity (sugar cane) processed by the claimant during the statutory tax period was \$39,982.44, which amount gives no effect to the applicable portion of crop benefit payments received by the claimant during the tax period under the Agricultural Adjustment Act, as amended, pursuant to a Sugar Cane Production Adjustment Contract.

2. The United States Processing Tax Board of Review erred in failing to hold, find and decide that the cost of commodity (sugar cane) processed by the claimant during the statutory tax period was \$23,702.08, which amount gives effect to the applicable portion of crop benefit payments received by the claimant during the tax period under the Agricultural Adjustment Act, as amended, pursuant to a Sugar Cane Production Adjustment Contract.

3. The United States Processing Tax Board of Review erred in holding, finding and deciding that the claimant's statutory average margin for the tax period was lower than its statutory average margin for the period before and after the tax.

4. The United States Processing Tax Board of Review erred in failing to hold, find and decide that the claimant's statutory average margin for the tax period exceeded and was greater than its statutory average margin for the period before and after the tax.

5. The United States Processing Tax Board of Review erred in failing to hold, find and decide that the uncontradicted evidence in the record establishes that the claimant actually shifted its entire processing tax burden to others through the inclusion thereof in the selling prices received for its sugar products.

6. The United States Processing Tax Board of Review erred in holding, finding and deciding that the claimant was not relieved of its processing tax burden through the receipt by it of crop benefit payments under the Agricultural Adjustment Act, as amended, in the aggregate amount of \$22,200.11.

7. The United States Processing Tax Board of Review erred in failing to hold, find and decide that the claimant was relieved of its entire processing tax burden through the receipt by it of crop benefit payments under the Agricultural Adjustment Act, as amended, in the aggregate amount of \$22,200.11.

8. The United States Processing Tax Board of Review erred in holding, finding and deciding that claimant bore the burden of the amount paid by it as processing tax to the extent of \$3,655.82, and that there is due the claimant a refund of such amount.

9. The United States Processing Tax Board of Review erred in not holding, finding and deciding that claimant bore none of the burden of the amount paid by it as processing tax and that there is no refund due it.

10. The Tax Court of the United States erred in failing and refusing to grant the Commissioner's motion for rehearing, reconsideration and redetermination.

WHEREFORE, the Commissioner of Internal Revenue petitions that the decision of the United States Processing Tax Board of Review be reviewed by the United States Circuit Court of Appeals for the Fifth Circuit, that The Tax Court of the United States, which now has jurisdiction of this proceeding, be required to certify and file in this Court a transcript of the record in accordance

with the law and with the rules of this Court, and that appropriate action be taken to the end that the errors complained of may be reviewed and corrected by this Court.

(Signed) Samuel O. Clark, Jr.
Samuel O. Clark, Jr. R.F.B.
 Assistant Attorney General.

(Signed) J. P. Wenchel
J. P. Wenchel, R.F.B.
 Chief Counsel,
 Bureau of Internal Revenue.

Attorneys for Petitioner on Review.

OF COUNSEL:

Raymond F. Brown,
 Royal E. Maiden, Jr.,
 Special Attorneys,
 Bureau of Internal Revenue.

REM, JR./MMc 4-1-43.

UNITED STATES OF AMERICA }
 DISTRICT OF COLUMBIA } ss

ROYAL E. MAIDEN, JR., being duly sworn, says that he is a Special Attorney in the Bureau of Internal Revenue, and as such is duly authorized to verify the foregoing petition for review; that he has read said petition and is familiar with the contents thereof; that said petition is true of his own knowledge except as to the

matters therein alleged on information and belief, and as to those matters he believes it to be true.

(Signed) Royal E. Maiden, Jr.

Royal E. Maiden, Jr.,
Special Attorney,
Bureau of Internal Revenue.

Sworn and subscribed to
before me this 15th day
of April, 1943.

(Signed) George W. Kreis

Notary Public

My commission expires
Nov. 1, 1947.

The Tax Court of the United States
Filed May 10, 1943.

IN THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE FIFTH CIRCUIT
WEBRE-STEIB COMPANY, LTD.,
Petitioner on Review

v.

GUY T. HELVERING, Commissioner of
Internal Revenue,
Respondent on Review

No. 10657

T.C. Docket 389 P.T.

PETITION FOR
REVIEW AND ASSIGNMENTS OF ERROR

To the Honorable Judges of the United States Circuit Court of Appeals for the Fifth Circuit:

COMES NOW, Webre-Steib Company, Ltd., by its attorney, Carl J. Batter, and respectfully shows:

I
JURISDICTION

That the petitioner on review, Webre-Steib Company, Ltd.; (hereinafter called the taxpayer), is a corporation organized under the laws of the State of Louisiana, with

its principal office at Vacherie, Louisiana, which is within the jurisdiction of the United States Circuit Court of Appeals for the Fifth Circuit.

The Court in which the review in this proceeding is sought is the United States Circuit Court of Appeals for the Fifth Circuit, which Court has jurisdiction, if this petition be timely, to review the decision of the United States Processing Tax Board of Review in the instant proceeding by virtue of section 906(g), Title VII of the Revenue Act of 1936, 49 Stat. 1750 (U.S.C. 1940 ed., title 7, sec. 648).

The decision of the United States Processing Tax Board of Review was promulgated on November 14, 1942, wherein it was held that the claimant is entitled to a refund of \$3,655.62.

Following the aforesaid decision of the United States Processing Tax Board of Review, and within 45 days provided by said Board's rules for filing a motion for rehearing, to-wit, on December 30, 1942, the Webre-Steib Company, Ltd., the petitioner on review herein, filed with said Board a motion for rehearing, reconsideration, and redetermination.

The United States Processing Tax Board of Review, effective as of the close of business on December 31, 1942, was abolished and its jurisdiction transferred to the United States Board of Tax Appeals, now The Tax Court of the United States, by section 510 of the Revenue Act of 1942, 56 Stat. 967. Section 510(k) of said Act provides as follows:

"SAVING PROVISIONS.—Section 906(g) of the Revenue Act of 1936, as in effect prior to the date of enactment of the Revenue Act of 1942, shall remain in effect as to petitions to review decisions of the Board of Review rendered prior to January 1, 1943, but shall not, if any case involving any such petition is remanded for further proceedings in the Board of Tax Appeals, remain

in effect with respect to any further proceedings in such case."

Effective on the day after the date of enactment of the Act, the name of the United States Board of Tax Appeals was changed to "The Tax Court of the United States" by section 504 of the Revenue Act of 1942, 56 Stat. 957, enacted October 21, 1942.

The United States Processing Tax Board of Review, with the exception of receiving and filing the aforesaid motion for rehearing, reconsideration, and redetermination of its decision of November 24, 1942, filed by the Webre-Steib Company, Ltd., on December 30, 1942, took no action with respect to said motion for rehearing, reconsideration, and redetermination prior to its abolishment and the transfer of its jurisdiction to The Tax Court of the United States, as aforesaid. Thereafter, to-wit, on February 11, 1943, The Tax Court of the United States entered an order in this proceeding denying the Webre-Steib Company, Ltd.'s said motion for rehearing, reconsideration, and redetermination.

Your petitioner sincerely questions whether this Court has jurisdiction to hear this cause—but, since the respondent in the case below has filed a petition for review with this Court (Docket No. 10,641), this petition is filed to protect your petitioner's right should this Court hold that it has jurisdiction. A timely motion to dismiss this petition and the petition in Docket No. 10,641 will be filed.

The United States Processing Tax Board of Review mailed its findings and decision to the taxpayer and the Commissioner on November 24, 1942; and Section 906(g) of the Revenue Act of 1936 requires that the petition for review be filed within three months after the date of the mailing to the claimant and the Commissioner of the copy of the findings and decision of the Board. The findings and decision mailed on November 24, 1942, have never been withdrawn, modified, or changed in any manner, and the time for filing of a petition expired on

February 24, 1943; whereas the petition in Docket No. 10,641 was filed on April 19, 1943, and this petition is filed now.

On the other hand, if this Court should hold that the date of February 11, 1943, (the date the Tax Court of the United States denied a rehearing), is the focal date, both petitioners, that is, the petition in Docket No. 10,641 and this petition, are timely.

II

PRIOR PROCEEDINGS

The taxpayer during the entire periods here under consideration was engaged in the operation of a plantation, the growing of sugar cane thereon, the purchasing of sugar cane from others, and the processing of such sugar cane into direct-consumption sugar (refined sugar) and edible molasses, and was a processor of the basic agricultural commodity, sugar cane, within the meaning of section 9(d) (6) of the Agricultural Adjustment Act, as amended by section 2 of the Act, approved May 9, 1934. During the months of October, November, and December, 1934, the month of October, 1935, and the first eight days of the month of November, 1935, the claimant processed sugar cane into direct-consumption (refined sugar), and edible molasses, on the processing of which it paid to the Collector of Internal Revenue for the District of Louisiana the sum of \$8,168.74 (plus interest thereon of \$1.23), as processing tax under the Agricultural Adjustment Act, as amended.

The said processing tax was declared unconstitutional by the United States Supreme Court in *United States v. Butler* (297 U.S. 1) on January 5, 1936. Thereafter Congress enacted Title VII of the Revenue Act of 1936 (49 Stat. 1747-55) controlling the refunding of such taxes.

The taxpayer filed a timely and proper claim, on the prescribed form, and the Commissioner of Internal Revenue, by registered letter dated April 10, 1941, disallowed in full the said claim.

The taxpayer filed a timely petition for a review of the Commissioner's disallowance of said claim with the United States Processing Tax Board of Review; the Commissioner filed his answer; the matter was heard; and, on November 24, 1942, the said United States Processing Tax Board of Review mailed its findings and decision to the taxpayer and the Commissioner, holding therein that the taxpayer was entitled to a refund of \$3,655.82.

Thereafter both parties filed motions for rehearing and the said United States Processing Tax Board did not act on said motions prior to its abolition by statute on December 31, 1942. The said motions were renewed before the Tax Court of the United States, which Court acquired jurisdiction on January 1, 1943, as heretofore set forth; and, on February 11, 1943, the said Tax Court of the United States denied the said motion for rehearing.

III

NATURE OF CONTROVERSY

The question involved is how much of the processing taxes paid by the taxpayer is to be refunded pursuant to Title VII of the Revenue Act of 1936. The taxpayer paid \$8,168.74 as taxes and \$1.23 as interest. The United States Processing Tax Board of Review has found that the sum of \$3,655.82 should be refunded.

Title VII requires that the taxpayer, in order to recover, must show that it bore the burden of the tax, in whole or in part, and provides for the refund of such part of the tax as the evidence shows was borne by the taxpayer.

Title VII provides for a prima facie showing of margins, based on a comparison of the period two years before the tax and six months after the tax, with the tax period. The taxpayer did no processing in the period six months after the tax and the United States Processing Tax Board of Review allowed a refund of \$3,655.82 on

the margin showing for the period two years before the tax with the tax period.

Title VII provides that either party may rebut the margin showing by any evidence that shows the bearing of or shifting of the tax.

The taxpayer offered as rebuttal and this was received in evidence the margin showing for the 1936 crop. That crop compared with tax period shows that the taxpayer bore the entire burden of the tax. The United States Processing Tax Board made no findings with respect to the 1936 crop on the grounds that it tends in no way to establish either a *prima facie* case under the statute or to rebut the *prima facie* case established, and on which the Board's decision is based.

The taxpayer submits that the 1936 crop margin showing establishes the fact that it bore the entire burden of the tax, and the propriety of such evidence as establishing that fact is the issue raised on this appeal.

IV

ASSIGNMENTS OF ERROR

The taxpayer, being aggrieved by the decision of the United States Processing Tax Board of Review as aforesaid, together with the findings of fact and conclusions of law upon which the same is based, desires to obtain a review of the Board's decision by the United States Circuit Court of Appeals for the Fifth Circuit, and files this petition for review.

The assignments of error of the taxpayer, the petitioner on review herein, are as follows:

The said United States Processing Tax Board of Review erred in the findings of fact in the following respects:

- (1) In findings No. 10 and 11 the said Board refers to the period two years before the tax as the "base period" when, in fact, the entire contents of these findings relate only to the period two years before the tax.

(2) The said Board erred in failing to find that the petitioner did no processing during the statutory period six months after the tax, that is, February to July, 1936, inclusive.

(3) The said Board erred in failing to find that the total number of units of the commodity processed in the period October, 1936, to January, 1937,—the first processing after the tax period—was 2,958,064 pounds of sugar, 96° raw value; the gross sales value of all articles processed from such commodity was \$99,119.55 and the cost of the commodity processed was \$52,323.85; and that the average statutory margin for the 1936 crop, processed during the period October, 1936, to January, 1937, was \$.01582 per pound of sugar, 96° raw value.

The said Board erred in its application of the law to the facts by:

(4) Failing to decide that, based on the said Board's finding No. 6, the period two years before the tax was not a period comparable with the tax period in every respect, excepting the tax, and that such period should, therefore, be excluded, from the margin computation.

(5) Failing to decide that the period October, 1936, to January, 1937—during which the 1936 crop was processed, said processing being the first processing after the tax period—a period almost equal in length to the tax period was a period in which all the factors except the tax were the same as during the tax period; and that such period rebutted all presumptions and established the fact that the petitioner bore the entire burden of the tax.

(6) Failing to decide that the cost of commodity for the tax period, per unit of commodity, on comparison with the cost of commodity for the

1936 crop, results in the inescapable conclusion that the tax was not passed back.

(7) Failing to decide that the gross sales value of the articles derived from the commodity processed during the tax period, per unit of commodity, was less than the gross sales value of the articles derived from the commodity processed during the 1936 crop period, and the inescapable conclusion that the tax was not passed on.

(8) In the alternative, the said Board erred in failing to hold that since the petitioner did no processing during the period six months after the tax, the period of processing the 1936 crop should be included in the statutory period.

(9) The said Board erred in failing to hold from the facts found that this petitioner was unable to shift the tax owing to the economic factors inherent in the sugar industry and the controls established by the Agricultural Adjustment Act as amended.

(10) The said Board erred in failing to hold that based on the facts this petitioner bore the entire burden of the tax and is entitled to a refund of the entire tax paid, that is, \$8,169.97.

WHEREFORE, the taxpayer petitions that the decision of the United States Processing Tax Board of Review be reviewed by the United States Circuit Court of Appeals for the Fifth Circuit, should the said Court determine that it has jurisdiction; that the Tax Court of the United States, which now has possession of the record in the case at bar, be required to certify and file in this Court a transcript of the record in accordance with the law and with the rules of this Court; and that appropriate action be taken to the end that the errors complained of may be reviewed and corrected by this Court.

(signed) C. J. Batter

C. J. Batter

Attorney for Petitioner on Review

United States of America }
District of Columbia } ss.

CARL J. BATTER, BEING DULY SWORN, SAYS:

I am the attorney for the petitioner on review in this proceeding; I prepared the foregoing petition and am familiar with the contents thereof. The allegations of fact contained therein are true to the best of my knowledge, information and belief. This petition is not filed for the purpose of delay, and I believe the petitioner is justly entitled to the relief sought.

(signed) C. J. Batter

C. J. Batter

Sworn to and subscribed to before me this 5th day of May, 1943.

(signed) Margaret Devers

Notary Public

The Tax Court of the United States
Filed Jul 7-1943

IN THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE FIFTH CIRCUIT

GUY T. HELVERING, Commissioner of Internal Revenue,	}	No. 10641
Petitioner on Review,		
v.		
WEBRE STEIB COMPANY, LTD.,	}	T.C. Docket No. 389 P.T.
Respondent on Review.		
WEBRE STEIB COMPANY, LTD.,	}	No. 10657
Petitioner on Review,		
v.		
GUY T. HELVERING, Commissioner of Internal Revenue,	}	
Respondent on Review.		

AGREED STIPULATION THAT CERTAIN
ADDITIONAL FACTS, TOGETHER WITH
THE FACTS APPEARING IN THE FIND-
INGS OF FACT AND DECISION OF THE
UNITED STATES PROCESSING TAX
BOARD OF REVIEW, PROMULGATED AND
DATED NOVEMBER 24, 1942, REPRESENT
AND CONSTITUTE ALL THE FACTS IN-
TRODUCTION IN EVIDENCE AND APPEAR-
ING IN THE RECORD MADE AT THE
HEARING ON THE MERITS BEFORE THE
UNITED STATES PROCESSING TAX
BOARD OF REVIEW.

It is hereby stipulated and agreed by and between
the parties to the above-entitled and numbered consoli-

dated causes, by their respective counsel of record, that the following additional facts, together with the facts appearing in the findings of fact and decision of the United States Processing Tax Board of Review, promulgated and dated November 24, 1942, represent and constitute all the facts introduced in evidence and appearing in the record made at the hearing on the merits before the United States Processing Tax Board of Review.

1. The Webre Steib Company, Ltd., did no processing during the period February 1, 1936, to and including July 31, 1936, said period being a part of the statutory base period known as the period after the tax.

2. All of the quantities and values set forth in finding of fact No. 10 of the findings of fact and decision of the United States Processing Tax Board of Review, promulgated and dated November 24, 1942, stated to represent the base period, are, in fact, applicable only to the period two years before the tax.

3. The quota system under the Agricultural Adjustment Act, as amended, was in full force and effect during the period June 8, 1934, to and beyond January 3, 1937.

4. The first processing done by the Webre Steib Company, Ltd., after the invalidation of the Agricultural Adjustment Act, as amended, on January 6, 1936, was the processing of the 1936 crop during the period October 27, 1936, to and including January 3, 1937. The total number of units of the commodity processed by the Webre Steib Company, Ltd., in the 1936 crop period was 2,958,064 pounds of sugar, 96 degrees raw value; the gross sales value of all articles processed by the Webre Steib Company, Ltd., from such commodity was \$99,119.95, or \$0.03351 per unit; the cost of the commodity processed during the 1936 crop period was \$52,323.85, or \$0.01769 per unit; and the average margin for the 1936 crop, computed in the same manner in every respect

as the statutory margins, was \$46,796.10, or \$0.01582 per unit.

J. P. Wenchel

J. P. Wenchel, K.F.B.

Chief Counsel,

Bureau of Internal Revenue.

Attorney for Guy T. Helvering,
Commissioner of Internal Revenue.

C. J. Batter

C. J. Batter

Attorney for Webre Steib Company,
Ltd.

REM,JR./MMc 7-7-43.

The Tax Court of the United States

Filed Jul 7-1943

IN THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE FIFTH CIRCUIT

GUY T. HELVERING, Commissioner of Internal Revenue,	}	No. 10641
Petitioner on Review,		
v.		
WEBRE STEIB COMPANY, LTD.,	}	No. 389 P.T.
Respondent on Review.		
WEBRE STEIB COMPANY, LTD.,	}	No. 10657
Petitioner on Review,		
v.		
GUY T. HELVERING, Commissioner of Internal Revenue,	}	
Respondent on Review.		

JOINT DESIGNATION OF PORTIONS OF
RECORD, PROCEEDINGS AND EVIDENCE
TO BE CONTAINED IN THE RECORD ON
REVIEW IN THE ABOVE-ENTITLED AND
NUMBERED CONSOLIDATED CAUSES.

To the Clerk of The Tax Court of the United States:

You will please prepare, transmit and deliver to the Clerk of the United States Circuit Court of Appeals for the Fifth Circuit copies duly certified as correct of the following documents and records in the above-entitled and numbered consolidated causes in connection with the petitions for review by the United States Circuit Court of Appeals for the Fifth Circuit heretofore filed by Guy T. Helvering, Commissioner of Internal Revenue, and Webre Steib Company, Ltd., respectively:

1. The docket entries of the proceedings before the United States Processing Tax Board of Review and The Tax Court of the United States.

2. Pleadings:

(a) Petition filed with the United States Processing Tax Board of Review on July 1, 1941, including annexed copy of claim for refund and copy of notice of disallowance by the Commissioner of Internal Revenue.

(b) Answer to petition filed with the United States Processing Tax Board of Review on August 11, 1941.

3. Findings of fact and decision of the United States Processing Tax Board of Review, promulgated and dated November 24, 1942, together with the memorandum attached thereto.

4. Respondent's (petitioner on review in the above-entitled cause docketed under No. 10641) motion for rehearing, reconsideration and redetermination filed with the United States Processing Tax Board of Review on December 30, 1942.

5. Petitioner's (petitioner on review in the above-entitled cause docketed under No. 10657) motion for rehearing filed with the United States Processing Tax Board of Review on December 30, 1942.

6. Order dated February 11, 1943, signed by Hon. J. E. Murdock, Presiding Judge of The Tax Court of the United States, denying the motions for rehearing, reconsideration and redetermination, referred to in Nos. 4 and 5 above.

7. Petition for review and assignments of error filed by Guy T Helvering, petitioner on review in the above-entitled cause docketed under No. 10641, and proofs of service thereof. Proofs of service not of record.

8. Petition for review and assignments of error filed by petitioner on review in the above-entitled cause

docketed under No. 10657, and proofs of service thereof. Proof of service not of record.

9. Stipulation for consolidation of causes on appeal, and the order of the Circuit Court with respect thereto. Not of record.

10. Motion filed by the parties in the above-entitled and numbered consolidated causes for an extension of time within which the transcript of the record on review in said causes may be filed in the Circuit Court by the Clerk of The Tax Court of the United States, and the order of the Circuit Court with respect thereto. Not included in record.

11. Agreed stipulation that certain additional facts, together with the facts appearing in the findings of fact and decision of the United States Processing Tax Board of Review, promulgated and dated November 24, 1942, represent and constitute all the facts introduced in evidence and appearing in the record made at the hearing on the merits before the United States Processing Tax Board of Review.

12. This joint designation.

J. P. Wenchel

J. P. Wenchel, K.F.B.

Chief Counsel,

Bureau of Internal Revenue.

Attorney for Guy T. Helvering,

Commissioner of Internal Revenue.

C. J. Batter

C. J. Batter

Attorney for Webre Steib Company,
Ltd.

REM,JR./MMc 7-7-43.

THE TAX COURT OF THE UNITED STATES
 COMMISSIONER OF INTERNAL
 REVENUE,

v.

Petitioner,

No. 10641

WEBRE STEIB COMPANY, LTD.,

Respondent.

Tax Court Docket No. 389 P. T.

WEBRE STEIB COMPANY, LTD.,

Petitioner,

v.

COMMISSIONER OF INTERNAL
 REVENUE,

No. 10641

Respondent.]

CERTIFICATE

I, B. D. Gamble, clerk of The Tax Court of the United States do hereby certify that the foregoing pages, 1 to 70, inclusive, contain and are a true copy of the transcript of record, papers, and proceedings on file and of record in my office as called for by the Praeipie in the appeal (or appeals) as above numbered and entitled.

In testimony whereof, I hereunto set my hand and affix the seal of The Tax Court of the United States, at Washington, in the District of Columbia, this 13th day of July, 1943.

B. D. Gamble
 Clerk,

The Tax Court of the United States.

(SEAL)

[fol. 72] That thereafter the following proceedings were had in said cause in the United States Circuit Court of Appeals for the Fifth Circuit, viz:—

ARGUMENT AND SUBMISSION

Extract from the Minutes of January 25th, 1944

No. 10641

COMMISSIONER OF INTERNAL REVENUE,

versus

WEBRE STEIB COMPANY, LTD.

On this day this cause was called, and, after argument by Carl J. Batter, Esq., for respondent, and Joseph M. Jones, Esq., Special Assistant to the Attorney General, for petitioner, was submitted to the Court.

[fol. 73] ARGUMENT AND SUBMISSION

Extract from the Minutes of January 25th, 1944

No. 10657

WEBRE STEIB COMPANY, LTD.

versus

COMMISSIONER OF INTERNAL REVENUE

On this day this cause was called, and, after argument by Carl J. Batter, Esq., for petitioner, and Joseph M. Jones, Esq., Special Assistant to the Attorney General, for respondent, was submitted to the Court.

[fol. 74] OPINION OF THE COURT—Filed February 15, 1944
IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE
FIFTH CIRCUIT

No. 10641

COMMISSIONER OF INTERNAL REVENUE, Petitioner,

versus

WEBRE STEIB COMPANY, LTD., Respondent

No. 10657

WEBRE STEIB COMPANY, LTD., Petitioner,

versus

COMMISSIONER OF INTERNAL REVENUE, Respondent

Petitions for Review of Decision of the United States Processing Tax Board of Review, Washington, D. C.

(February 15, 1944)

Before Holmes, Waller, and Lee, Circuit Judges.

HOLMES, Circuit Judge:

The Webre Steib Company, being a processor of centrifugal sugar and molasses, was required to pay \$8,169.97 as processing taxes under the Agricultural Adjustment Act of 1933. After the tax was declared illegal and the taxpayer's [fol. 75] claim for refund had been disallowed, this proceeding was instituted before the Processing Tax Board of Review for the recovery of the total tax paid. From the decision there entered awarding a refund in the sum of \$3,655.82 both parties have brought petitions for review. The crucial question presented is whether the taxpayer, by proof adduced before the Board, established that it bore, in whole or in part, the ultimate economic burden of the tax paid.

The exclusive procedure whereby refunds of processing taxes paid under the Agricultural Adjustment Act of 1933 may be secured is provided by Title VII, Section 906, of the Revenue Act of 1936.¹ It is incumbent upon the claimant to

¹ Anniston Mfg. Co. v. Davis, 301 U. S. 337; 49 Stat. 1748, 7 U. S. C. A., Sec. 648.

establish that he paid and bore the burden of the tax and was not relieved thereof nor reimbursed therefor in any manner whatsoever.² This burden of proof is substantive, and remains upon the claimant throughout the trial.³ He may discharge it either by direct proof of the actual extent to which he bore the ultimate economic burden of the tax, or by proof of facts which, by express provision in Section 907 of the Act, give rise to a rebuttable presumption that the burden was borne to the extent indicated by the facts proved.⁴ The refund entered by the Board was awarded upon the theory that the claimant had established facts sufficient to invoke the statutory presumption that it had borne the burden of the tax to the extent of \$3,655.82.

The Commissioner contends that no refund of any part of the tax should have been awarded for two reasons: (1) Since the claimant produced a substantial portion of the sugar cane it processed, and as such producer received [fol. 76] benefit payments from the Government out of processing taxes collected, the amount of such benefit payments received should have been included in the computation of the average margin per unit of the commodity processed during the tax period; that the computation so made would give rise to a presumption that the tax burden had been wholly shifted; and (2) that the facts found by the Board were sufficient to rebut the presumption, causing it to disappear entirely from the case, and left the claimant without any proof whatsoever in support of its claim.

Except for an obscure and wholly untenable suggestion by the claimant that it carried the burden upon it without resort to the presumption by adducing evidence rebutting the presumption in so far as it was favorable to the Commissioner, each issue in this case turns upon the statutory presumption as applied to the uncontradicted facts. No attempt was made to prove by direct, affirmative evidence that the claimant did not shift the tax, was not reimbursed for it, and did not otherwise escape the burden of it.

² Sec. 902 of the Revenue Act of 1936, 49 Stat. 1747, 7 U. S. C. A., Sec. 644.

³ *Central Vermont R. Co. v. White*, 238 U. S. 507; *Commissioner v. Bain Peanut Company*, 134 F. (2) 853.

⁴ *Anniston Mfg. Co. v. Davis*, 301 U. S. 337; *Commissioner v. Bain Peanut Company*, 134 F. (2) 853.

We have recently had occasion to make an exhaustive analysis of this presumption, its purpose and effect, how it may be invoked and rebutted, and the consequences of rebuttal.⁵ By reference to that discussion we reiterate those principles here.

Upon the hearing before the Board the claimant proved that its average margin per unit of the commodity processed was lower during the tax period than was its average margin for the period before and after the tax, and the extent of the difference, translated into money, was \$3,655.82. With regard to this recovery, claimant says that the marginal computation was proper. In support of its claims for [fol. 77] recovery of the total tax paid, however, the taxpayer contends that, since it did no processing in the period after the tax, and since the period before the tax was not reasonably comparable to the tax period because factors not considered in the margin computation materially affected basic conditions, any inference based upon a comparison of the two periods was arbitrary and unreasonable, and could not stand. The claimant argues that, for this reason, the marginal computation should be based upon a comparison of the tax period with the period during which it processed the 1936 crop.

Section 907, being a part of a statute in derogation of the sovereign immunity from suit, must be strictly construed.⁶ The tax period and the period before and after the tax are carefully defined by the statute, and must be applied accordingly. Since this taxpayer engaged in no business in the period after the tax, it was authorized by the statute, with the consent of the Commissioner, to substitute therefor the average prices paid during that period by representative concerns similarly engaged and circumstanced,⁷ but it could not take any other periods for purposes of comparison. If, because of factors not considered in the computation, any inference based upon a comparison

⁵ Commissioner v. Bain Peanut Company, 134 F. (2) 853.

⁶ Cheatham v. U. S., 92 U. S. 85; McElrath v. U. S., 102 U. S. 426; U. S. v. Michel, 282 U. S. 656; U. S. v. Durrance, 101 F. (2) 109.

⁷ Sec. 907(c) of the Revenue Act of 1936, 7 U. S. C. A., Sec. 649(c).

of the margins during the respective periods would bear no reasonable relation to actuality, the inference would be arbitrary and the statutory presumption would be inapplicable.

We consider equally untenable the contention of the Commissioner that monies received by the taxpayer as crop benefit payments should reduce proportionately the cost of the commodity processed during the tax period, or should otherwise be offset against any refund allowable. These payments were made to producers only; the processing [fol. 78] taxes were assessed against processors only. The respective statutes were considered and enacted by Congress at the same time; indeed, as the Commissioner contends, they were parts of the same integrated program, yet the benefit payments were not restricted by statute to producers who did not also process, and the taxing statute made no differentiation between those who processed only and those who also produced. It is also significant that the refund statute, drafted in full awareness of the respective incidences of the tax, contains no distinctive limitations upon allowances to producer-processors. These considerations warrant the conclusion that, except for whatever incidental effect the benefit payments had upon the cost of the commodity processed and were accordingly reflected in the marginal computation made, the fact that this processor was also a producer had no effect upon his claim for refund.

It thus appears that, conceding the validity of the marginal computation to support the inference drawn by the Board, the claimant's evidence at its best made out a *prima facie* case for a refund of \$3,655.82. The remaining question is whether, as contended by the Commissioner, the facts adduced upon the hearing and found true by the Board rebutted the presumption upon which the refund depended. We adhere to our ruling in the *Bain Peanut Company* case that the statutory presumption, when rebutted, disappears entirely from the case; and if there is no proof *aliunde* the presumption, the taxpayer, upon whom the burden of proof lies, must suffer an adverse decision.

Section 907(e) of the Revenue Act of 1936 provides that the presumption may be rebutted by proof that the marginal difference was attributable to factors other than the tax; that sales contracts were modified or changed to reflect the tax; that commodity prices were increased in substantially

[fol. 79] the amount of the tax; that the tax was separately billed; or by other proof indicative of a shifting of the tax or an arrangement for reimbursement therefor.⁸ In this case a part of the tax was paid upon the processing of sugar, and the remainder for processing molasses. Upon evidence before it the Board found that the claimant had participated in a universal increase in the selling price of sugar, effective as of the moment the processing tax was imposed, to cover the amount of the tax; and that claimant had collected from its vendees all taxes, for the entire period of the tax, assessed upon the processing of molasses, and all taxes for processing sugar during the year 1935. These findings are not attacked. Moreover, there was no showing that this policy of shifting the burden of the tax, thus shown to exist at the beginning and end of the tax period, did not continue throughout the effective period of the taxing statute. This evidence clearly was sufficient to dissolve the presumption,⁹ and since there was no other proof to support any refund, the claim should have been disallowed in its entirety.

Upon the petition of the claimant, the decision of the Board is affirmed; upon the petition of the Commissioner, the decision is reversed and the cause remanded to the Tax Court for further proceedings not inconsistent with this opinion.

⁸ Sec. 907(e) of the Revenue Act of 1936, 7 U. S. C. A., Sec. 649(e).

⁹ *Mobile J. & K. C. R. R. v. Turnipseed*, 219 U. S. 35; *Commissioner v. Bain Peanut Co.*, 134 F. (2) 853.

[fol. 80]

JUDGMENT

Extract from the Minutes of February 15, 1944

No. 10641

COMMISSIONER OF INTERNAL REVENUE

versus

WEBRE STEIB COMPANY, LTD.

No. 10657

WEBRE STEIB COMPANY, LTD.,

versus

COMMISSIONER OF INTERNAL REVENUE

These causes came on to be heard on the petitions of Commissioner of Internal Revenue and Webre Steib Company, Ltd., for review of the decision of the United States Processing Tax Board of Review, and were argued by counsel;

On consideration whereof, It is now here ordered, adjudged and decreed by this Court, that upon the petition of the claimant, Webre Steib Company, Ltd., that said decision be, and the same is hereby, affirmed; and that upon the petition of the Commissioner that said decision be, and the same is hereby, reversed; and that said cause be, and it is hereby, remanded to the Tax Court of the United States for further proceedings not inconsistent with the opinion of this Court.

[fol. 86]

ORDERS DENYING REHEARING

Extract from the Minutes of March 13, 1944

No. 10641

COMMISSIONER OF INTERNAL REVENUE,

versus

WEBRE STEIB COMPANY, LTD.

It is ordered by the Court that the petition for rehearing filed in this cause be, and the same is hereby, denied.

No. 10657

WEBRE STEIB COMPANY, LTD.,

versus

COMMISSIONER OF INTERNAL REVENUE

It is ordered by the Court that the petition for rehearing filed in this cause be, and the same is hereby, denied.

[fol. 87] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 88] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 9, 1944

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.



FILE COPY

U.S. DISTRICT COURT
JUN 12 1944
CHARLES ELMORE GROPLEY
CLERK

IN THE

Supreme Court of the United States

October Term, 1944.

No. **148**

WEBER STEIB COMPANY, LTD., *Petitioner,*

vs.

COMMISSIONER OF INTERNAL REVENUE, *Respondent.*

**PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE FIFTH CIRCUIT AND SUPPORTING
BRIEF.**

C. J. BATTER,

902 American Security Building,
Washington, D. C.,

Counsel for Petitioner.

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IN THE
Supreme Court of the United States

October Term, 1944.

No. _____

WEBRE STEIB COMPANY, LTD., *Petitioner,*

vs.

COMMISSIONER OF INTERNAL REVENUE, *Respondent.*

**PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE FIFTH CIRCUIT.**

*To the Honorable the Chief Justice and the Associate
Justices of the Supreme Court of the United States:*

Your Petitioner, Webre Steib Company, Ltd., a Louisiana corporation, respectfully prays that a writ of certiorari issue to review the final judgment of the United States Circuit Court of Appeals for the Fifth Circuit in the foregoing consolidated cause (Docket Numbers 10641 and 10657). That Court's opinion was rendered on February 15, 1944, and the petition for rehearing was denied on March 13, 1944.

JURISDICTION.

Jurisdiction is conferred upon the Supreme Court to review this cause by writ of certiorari by Section 240(a) of the Judicial Code as amended by the Act of February 13, 1935 (U. S. C. A., Title 28, Section 347), and by the Revenue Act of 1936, Title VII, Section 906(g) printed in the Appendix hereto.

SUMMARY STATEMENT OF MATTERS INVOLVED.

Webre Steib Company, Ltd., herein for convenience called Webre, was a grower and processor of sugarcane, and during the period from June 8, 1934, through November 8, 1935, paid processing taxes totaling \$8,169.97 under the Agricultural Adjustment Act of 1933 as amended. It filed claim for refund of these taxes pursuant to Title VII of the Revenue Act of 1936. The Commissioner of Internal Revenue having disallowed this claim, petition was filed thereon with the United States Processing Tax Board of Review.

That Board, after a hearing, made findings of fact, among others, to the effect that Webre bore the burden of the processing tax paid by it to the extent of \$3,655.82 (R. 30-36) and did not shift such burden in any manner whatsoever, and rendered a decision that Webre is due a refund of that amount (R. 36). Webre and the Commissioner each filed a motion for rehearing with the said Board; but, the said Board failed to act on such motions before it was abolished by statute on December 31, 1942. Thereafter, The Tax Court of the United States which had acquired jurisdiction by Section 510 of the Revenue Act of 1942 denied the said motions for rehearing (R. 47). From the decision of the Processing Tax Board both parties filed petitions for review in the Circuit Court of Appeals for the Fifth Circuit pursuant to the Revenue Act of 1936, Title VII, Section 906(g).

In addition to those just mentioned, the Processing Tax Board of Review made fact findings—

- (a) as to the factors influencing the price of raw and refined sugar during the period two years before the tax (Finding 6, R. 33-34);
- (b) that the average margin per unit of the commodity processed was \$.00162 lower in the tax period than it was during the base period (Finding 11, R. 35);
- (c) that there was a universal increase in the sale price of sugar, on the effective date of the tax, in an amount slightly in excess of the tax (Finding 6, R. 34);
- (d) that the broker who sold the sugar for Webre wrote a letter to Webre that it paid no more tax than it collected (Finding 12, R. 35-36); and
- (e) that Webre was a grower of sugarcane and a purchaser of sugarcane which it processed during a period of less than three months between the dates of October 17th and January 3rd each year (Findings 1 and 2, R. 31).

The foregoing fact findings by the Board are the pertinent ones here. Important too, are facts that the Board failed to find, namely:

- (a) that Webre did no processing during the period six months after the tax (Stipulation Par. 1 and 2, R. 66);
- (b) that the quota system under the Agricultural Adjustment Act, as amended, was in full force and effect during the period June 8, 1934, to and beyond January 3, 1937 (Stipulation Par. 3, R. 66); and
- (c) that a margin computation based on the processing of the 1936 crop reveals that Webre bore the burden of a greater amount of tax, by \$1,134.14, than it actually paid (Opinion R. 39; Stipulation, Par. 4, R. 66).

The Commissioner appealed to the Circuit Court of Appeals. That Court reversed the judgment of the Processing

Tax Board of Review on the ground that the universal price increase on the effective date of the tax and the broker's letter to Webre *dissolved* the presumption created by the margin computation (R. 29) 77

Webre appealed to the Circuit Court of Appeals on the grounds that the margin and refund determined by the Board was a minimum sum; that the findings actually made with respect to the period two years before the tax rebutted the balance of the margin that was unfavorable to Webre; and that the 1936 crop was proper rebuttal evidence and revealed that Webre bore the full burden of the tax. The Circuit Court held that the findings with respect to the two years before the tax at best would make the statutory presumption inapplicable (R. 29) instead of accounting for the balance, and that the 1936 crop experience could not be used as a comparison or rebuttal (R. 75).

Webre's contentions are that the Court erroneously held the statutory *prima facie* showing is completely dissolved and loses all probative effect upon the presentation of any evidence tending to rebut it; that the Court erred in failing to treat the 1936 crop experience as proper rebuttal; that the Court erred in failing to hold that the margin showing resulting from the two years before the tax was a minimum margin; that the Court erred in failing to hold that the variance in such factors was proper rebuttal of the unfavorable part of the margin, and that the Board's Findings require a decision that Webre bore the full burden of the tax. Hence from Webre's viewpoint these are the

QUESTIONS PRESENTED.

1. What meaning and effect did Congress, in Section 907 of the Revenue Act of 1936, intend to give to the "*prima facie* evidence" arising from the comparison of the average margins computed as therein authorized?
2. Was the evidence submitted by the Commissioner of Internal Revenue sufficient to rebut the *prima facie* show-

ing made by Webre under Section 907(a) of the Revenue Act of 1936?

3. If the term "prima facie evidence" is to be regarded as merely a rebuttable presumption in the strict sense and as being completely dissolved upon the presentation of any evidence tending to rebut it, then arises the issue as to whether or not, independent of the presumption, there was substantial evidence in the record supporting the finding of the Board that Webre bore the burden of the tax to the extent of \$3,655.82?

4. There being substantial evidence to support the Board's finding that Webre bore the burden of the tax to the extent of \$3,655.82, was the Circuit Court of Appeals authorized to review the evidence and substitute a contrary conclusion for that of the Board?

5. Is a margin computation based on the succeeding crop (1936) under conditions where all factors, except the tax, are alike, proper rebuttal of the balance of a margin computation found to contain factors that are not alike?

REASONS FOR GRANTING THE WRIT.

1.

In construing Section 907 of the Revenue Act of 1936, the Circuit Court of Appeals followed its analysis of the presumption in *Commissioner v. Bain Peanut Company* (134 F. (2) 853). This Court granted certiorari in *Bain Peanut Company of Texas v. Commissioner* (320 U. S. 721). However, this Court did not decide the question as the petition was dismissed on motion of the *Bain Peanut Company* on March 6, 1944. The question is more important now than it was when this Court granted certiorari in the *Bain* case (*supra*) as the said Circuit Court of Appeals continues to follow the *Bain* case at times and there is being filed simultaneously with this petition two other petitions, namely *Caldwell Sugars, Inc.* and *Slack Bros., Inc.*, from the same Circuit on the same question.

2.

The importance of the question is readily apparent from an examination of Title VII of which Section 907 is a part (see Appendix). This Title prescribes an exclusive method of obtaining refunds of processing taxes paid under the unconstitutional provisions of the Agricultural Adjustment Act of 1933; *Anniston Manufacturing Company v. Davis* (301 U. S. 337). Claims for refund were easily known to be so numerous and important that Congress in Section 906 felt impelled to establish a special agency, the Processing Tax Board of Review, to hear and pass upon refund claims exclusively. At the heart of every claim is the comparison of average margins for the tax period and the period before and after the tax; no claimant can get his claim considered without presenting this prescribed margin computation or without having the margin computation invoked against him. It is obviously important to all taxpayers having refund claims now to know whether the prima facie evidence or the presumption established by Subsection (a) of Section 907 is to disappear wholly and be completely dissolved when any substantial rebutting evidence is produced, or, as Subsection (c) would seem to indicate, must it be rebutted "by proof of the actual extent to which the claimant shifted to others the burden of the processing tax?"

3.

Furthermore, in the present case the Fifth Circuit Court of Appeals has rendered a decision in conflict with other Circuit Court of Appeals on the same matter. We refer to the decision of the Circuit Court of Appeals for the Second Circuit in *Regensburg v. Helvering* (130 Fed. (2d) 507). In that case the margin for the tax period was greater than for the period before and after the tax; that is, it was unfavorable to the taxpayer. That Court said:

"The caption of § 907 is 'Evidence and presumptions,' and §907 (c) speaks of the 'prima facie evi-

dence' as a 'presumption.' This might mean that, as soon as the claimant had put in any evidence, the office of the presumption was over; or it might mean that the claimant had the burden of proof. That question was reserved in *Epstein v. Helvering*, 4 Cir., 120 F. (2d) 427, but we must decide it here. We think that 'presumption' cannot in this connection mean burden of proof because the claimant has that burden anyway; on the other hand the section can hardly mean merely to set up a presumption, because no presumption is necessary against one who has the burden of proof. True, a claimant would be helped by a presumption when the 'margin' for the 'tax period' is less than that for the 'base period', but if no more than that was meant, it is difficult to see why it should have been necessary to speak of any 'presumption' when the spread between 'margins' was against him. For these reasons we think that the section could not have used presumption in the strict sense, but that it meant that when the spread between 'margins' is against the claimant, even though he may in general have otherwise satisfied the conditions of \S 902, 7 U. S. C. A. \S 644, he must show that the spread was not owing to his shifting the tax."

The Second Circuit Court therein says that the statute does not use "presumption" in the *strict sense*; whereas in the present case, the Court for the Fifth Circuit says in effect that it was used in the strict sense. In the *Regensburg* case the Court says that even though the taxpayer may in general have otherwise satisfied the conditions of Section 902,—that is, by showing that he bore the burden of such amount and has not been relieved thereof nor reimbursed therefor nor shifted such burden directly or indirectly through various means there enumerated "or in any other manner whatsoever",—he must still go further, if the margin is against him, and "show that the spread was not owing to his shifting the tax". In other words, in the *Regensburg* case the Court held that even though the taxpayer has otherwise shown that he has not shifted the tax, he must still overcome the margin by evidence. Thus the

Court for the Second Circuit did not treat the margin as a presumption dissolved by offering some rebuttal, but as a piece of evidence to be overcome by evidence of greater weight.

We also refer to *Helvering v. Insular Sugar Refining Corp.* (not yet reported, but appearing in Commerce Clearing House 1944 Federal Tax Service, paragraph 9260) decided by the United States Court of Appeals for the District of Columbia on March 27, 1944. That was a sugar processing case. There, as here, the Processing Tax Board determined a margin partly favorable to the taxpayer; there, as here, there was a price increase on the effective date of the tax; there, as here, the taxpayer did no processing for months after the imposition of the tax. A divided Court affirmed the Board; but, even the dissenting opinion holds that the margin computation retains probative value. Edgerton, J., states:

“Both because of the provisions of section 907(e) and independently of section 907(e), therefore, in my opinion the evidence eliminated the presumption, as such, from the case. The difference in margins was not eliminated from the case, but it was only evidence, entitled to no artificial weight.”

4.

The Circuit Court of Appeals in this case (and *Caldwell* and *Slack* filed this day) conflicts with the FOURTH CIRCUIT as to the relevancy of other evidence advanced by the taxpayer upon a showing that the statutory margin periods are not comparable.

In *Epstein v. Helvering*, (120 F. (2d) 427) the Fourth Circuit Court of Appeals excluded the post-tax period from a margin computation because conditions had changed, stating at page 430:

“It is manifest from these figures that a comparison of the statutory margins does not furnish a reliable method for the solution of the issue in this case. Such

a method is of no value unless, throughout the successive periods, all the factors, except the tax, entering into the manufacture and sale of the goods remain constant."

The same Court in *Arkwright Mills v. Commissioner*, (127 F. (2d) 465), held that a period after the tax that included the statutory post-tax period was proper rebuttal of the statutory margin. It stated at pages 467-8:

"We understand the Board to hold that the evidence as to change in demand in the periods chosen by Congress for comparison should be ignored because the evidence represents merely an attempt to show what the taxpayer's margin would have been during the tax period if there had been no tax; and because this effort involves the setting up of a hypothetical or imaginary situation which has no tendency to prove the actual extent to which the taxpayer bore the burden of the tax. This point of view in our opinion cannot be maintained. In the first place it is manifest that the statutory test, which Congress itself devised, involves a comparison of the taxpayer's actual position during the tax period with what it would have been if there had been no tax. * * * Clearly, this test assumes that all the factors except the tax which affect the margins are the same in both periods, for otherwise the comparison would not show whether the taxpayer bore the burden or not; and this assumption involves the very sort of hypothesis which the Board condemns. That this is true is recognized by high authority. See Statement of Secretary of Agriculture Wallace before Finance Committee on Title VII of the Revenue Act of 1936, Hearings before Committee on Finance, United States Senate, 74th Congress 2nd Session, on H. R. 12, 395, p. 859; Ferger on Windfall Tax and Processing Tax Refund, *American Economic Review*, March, 1937, p. 52."

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IN THE

Supreme Court of the United States

October Term, 1944.

No. _____

WEBRE STEIB COMPANY, LTD., *Petitioner,*

vs.

COMMISSIONER OF INTERNAL REVENUE, *Respondent.*

BRIEF IN SUPPORT OF PETITION.**SPECIFICATIONS OF ERROR TO BE URGED.**

The Circuit Court of Appeals erred:

1. In construing the "prima facie evidence" and the "presumption" arising from the margin computations prescribed by Section 907 as being wholly dissolved and of no probative force when any substantial rebutting evidence is introduced.

2. In holding that the Commissioner of Internal Revenue could rebut the prima facie evidence arising from the margin computation in any manner other than "by proof of the actual extent to which the claimant (Webre) shifted to others the burden of the processing tax," as required by Subsection (e) of Section 907.

3. In overthrowing the Board's finding of fact, supported by substantial evidence, that Webre bore the burden of the tax to the extent of \$3,655.82.

4. In failing to hold that the 1936 crop experience rebutted the balance of the margin and, therefore, that Webre bore the entire burden of the tax.

ARGUMENT.

Effect of the Presumption.

As clearly appears, the Court in following *Commissioner v. Bain*, (134 F. (2d) 853) based its construction of the prima facie evidence portions of Section 907 upon *Mobile, J. & F. C. RR. Co. v. Turnipseed*, 219 U.S. 35, and *Western & Atlantic Railroad Co. v. Henderson*, 279 U. S. 639, and said that any different construction would, as between private parties, violate the due process clause of the 14th Amendment or the same clause of the Fifth Amendment. The Court concedes, however, that there is no question of due process in this case, but "merely a question as to the weight and character of the presumption that Congress intended to create."

Congress itself indicated the weight and nature of the presumption in Subdivision (e) of Section 907, reading in part:

"Either the claimant or the Commissioner may *rebut* the presumption established by Subsection (a) of this Section by proof of the *actual extent* to which the claimant shifted to others the *burden* of the processing tax." (Italics supplied.)

The nature of the proof necessary to rebut the presumption is clearly prescribed; and this definitely negatives the idea that Congress intended the presumption to be dissolved upon the production merely of any substantial rebuttal.

Statutory presumptions, fundamentally, fall into one of three groups:

(1) An inference or assumption which must be drawn by the trier of facts from a given fact or set of facts with an operative effect only upon the burden of going forward

with the production of evidence; when any rebutting evidence is produced the presumption is dissolved (the Court held the presumption here to be of this type).

(2) An inference which must be drawn but which places upon the opponent the burden of persuading the trier that the presumed fact does not exist; i.e., the presumption shifts the burden of persuasion, i.e., of proof; and

(3) An inference which must be drawn and must be used by the trier with the evidence; it may have an effect upon the burden of producing evidence, but the satisfaction of the burden does not totally destroy the presumption, for its effect as evidence remains.

It is submitted that the language used by Congress in subdivision (e) indicates that it intended the presumption to have the effect of either (2) or (3). In the case of *Annis-ton Manufacturing Company v. Davis*, 301 U. S. 337, 354, this Court did not construe Section 907 as did the Circuit Court of Appeals in the present case. The Supreme Court said (page 354):

"But it cannot be said that the comparison set up between the results of operations during the 'tax period' and the 'period before or after the tax' are wholly irrelevant."

And again, (page 355) this Court said:

"The permissible, and we think the true, construction of Section 907 (e) is that the words 'actual extent' are used in contradistinction to the *presumed* extent, accorded to the *prima facie* presumption to which the proof in rebuttal is addressed. In the light of the context, and of the entire scheme of the administrative proceeding, we are of the opinion that the provision was intended to afford, and does afford, full opportunity to the claimant to present any evidence which may be pertinent to the questions to be determined by the Board of Review and which may be appropriate to overcome any presumption which might be indulged under Section 907 (a) or otherwise."

Observe that the Court speaks of proof in *rebuttal* and evidence to *overcome* the presumption, not merely dissolving it by the production of some evidence.

It is suggested that the Court below missed the real distinction between the presumption upheld in the *Turnipseed* case and the one held to be invalid in the *Henderson* case; the real distinction being that in the former there was "some rational connection between the fact proved and the ultimate fact presumed"; whereas, in the latter case this reasonable connection was absent, the Court saying:

"The mere fact of a collision between a railway train and a vehicle at a highway grade crossing furnishes no basis for any inference as to whether the accident was caused by negligence of the railway company or of the traveler on the highway company or of both or without fault of anyone."

There is no constitutional inhibition against a presumption such as (2) and (3) above which may shift to the opponent the burden of persuasion or which remains in the case as evidence even after some rebutting evidence is produced. The real ground upon which the state statutory presumption was held invalid in the *Henderson* case was because it was unreasonable and arbitrary and denied the railway company a fair opportunity to repel it. This Court has already held in the *Anniston Manufacturing Company* case that the presumption here is not unreasonable or arbitrary.

In the case of *Heiner v. Donnan*, 285 U. S. 312, 329, this Court recognizes that a rebuttable presumption may have the effect of shifting the burden of proof.

It has been repeatedly held that statutory presumptions, admittedly constitutional, do affect the burden of proof and are to be considered as evidence. As an illustration, the Internal Revenue Act now in effect and those for several years back contain a provision with respect to estate taxes that any transfer of a material part of his property made by a decedent within two years prior to his death without

consideration shall, unless shown to the contrary, be deemed to have been made in contemplation of death. This provision shifts to the taxpayer the burden of overcoming this presumption by satisfactory proof; and no Court has held that the presumption is unconstitutional or that it is dissolved merely upon the introduction of some proof of a rebuttable nature.

Shwab v. Doyle, 269 Fed. 321 (C. C. A. Sixth) (reversed on another point 258 U. S. 529), dealing with this statute, says (page 333):

"The provision in question raises a presumption of fact, not a presumption of law, and under well-settled rules a presumption of fact may be taken into account in determining the ultimate fact. * * * Unless the statutory presumption may properly be taken into account in determining the ultimate fact, it has no office. Elements which, in the absence of evidence to the contrary, are made sufficient to conclusively establish the ultimate fact, cannot be said to have no evidentiary influence in reaching that conclusion."

Other cases to a similar effect are *Myers v. U. S.*, 2 Fed. Supp. 1000, 1006 (Court of Claims), Writ refused 292 U. S. 629; *Myers v. McGruder*, 15 Fed. Supp. 488, 496; *Land Title & Trust Company v. McCaughn*, 7 Fed. Supp. 742, 744.

In *James-Dickinson Farm Mortgage Company v. Harry*, 273 U. S. 119, the Court says (page 124):

"It is well settled that a state may consider proof of one fact presumptive evidence of another, if there is a rational connection between them, and also that it may change the burden of proof."

Hawes v. Georgia, 258 U. S. 431, involved the prohibition laws of Georgia which provided that when any distilling apparatus is found upon the premises same shall be prima facie evidence that the person in possession of the premises had knowledge of the existence thereof. In a prosecution under this statute the burden of proof of course was on the

state to show the defendant's guilt, but it was held that when proof of possession was furnished the burden then shifted to the defendant to show his lack of knowledge. The Court said:

"The establishment of presumptions, and of rules respecting the burden of proof, is clearly within the domain of the state governments, and a provision of this character, not unreasonable in itself and not conclusive of the rights of the party, does not constitute a denial of the due process of law."

The Court below observed in the *Bain* case (supra) that "the law governing the burden of proof is a matter of substance," citing *Central Vermont Railway Co. v. White*, 238 U. S. 507.

Granting that the law governing burden of proof is a matter of substance, we submit that to construe the presumption here as one shifting the burden of proof would not result in changing the substantive law. The substantive law during the course of the hearing and at its end is the same as it was when the hearing began; the rule with respect to the statutory presumption was in effect before the hearing and remained the same throughout the hearing. In the case of *Central Vermont Ry. Co. v. White*, the Court was dealing with the question as to whether or not, in the particular case for personal injuries brought under a Federal statute but in a State court, the plaintiff had the burden of proving a lack of contributory negligence as required by the state rule or whether the burden was on the defendant to plead and prove the existence thereof as required by the practice in the Federal courts. The Court merely held that the rule with respect to the burden of proof was a matter of substance and not a matter of procedure, and therefore it would be assumed that Congress intended that the Federal rather than the State rule should prevail in all suits brought under the Federal Act.

Cited above is *Howes v. Georgia*, wherein a statute was upheld which raised a presumption of guilty knowledge

from proof of possession, and shifted to the defendant the burden of disproving such knowledge. Similarly, in *Yee Hem v. U. S.*, 268 U. S. 178, there was involved a prosecution for the offense of concealing smoking opium after importation with knowledge that it had been imported in violation of the Federal Act, the law providing, among other things, that "possession shall be deemed sufficient evidence to authorize conviction unless the defendant shall explain the possession to the satisfaction of the jury." The burden of course was on the prosecution to prove the guilt of the defendant beyond a reasonable doubt; but, possession having been proved, the burden shifted to the defendant to avoid conviction by producing satisfactory explanation of such possession. Although this presumption resulted in the shifting of the burden of proof, it was upheld, the Court saying (page 184):

"Every accused person, of course, enters upon his trial clothed with the presumption of innocence. But that presumption may be overdone, not only by direct proof, but in many cases, when the facts standing alone are not enough, by the additional weight of a counter-vailing legislative presumption. If the effect of the legislative act is to give to the facts from which the presumption is drawn an artificial value to some extent, it is no more than happens in respect of a great variety of presumptions not arising under the statute."

That the burden of persuasion (i. e. of proof) may shift during trial as the result of a presumption is further illustrated in criminal prosecutions where defendant interposes a plea of insanity. The burden of proof is on the defendant to show that he was insane at the time of the criminal act. But this burden shifts if proof is made that at a prior date he had been adjudged insane; the presumption that such insane condition continued to exist after the date of its judicial determination then places on the prosecution the burden of proving that at the time of the commission of the offense the accused was sane. (*Witty v. State*, 171 S. W. 229).

To say that a particular presumption has the effect only of requiring the adversary to produce some proof in rebuttal and then disappears would, in the case of trials in the District Courts, have the effect of transferring jury functions to judges, as Mr. Justice Black points out in his dissenting opinion in *New York Life Insurance Company v. Gamer* (303 U. S. 161, 172), in that thereby the trial judge would be given the right to weigh the rebutting evidence and "decide when sufficient evidence has been introduced to take from the jury" the right to find in favor of the presumed fact even though the jury might disbelieve the rebutting evidence or give less weight thereto than does the trial judge.

Hence we urge that the Court below misconstrued the terms "prima facie evidence" and "presumption" as used in Section 907; that the presumption was not dissolved but remained as evidence to be rebutted or overcome only by proof by the Commissioner "of the actual extent to which the claimant shifted to others the burden of the processing tax."

The Court Improperly Set Aside a Fact Finding of the Board and Substituted Its Own Finding Therefor.

The 14th Finding of Fact of the Processing Tax Board of Review (R. 36) was that Webre bore the burden of the processing tax paid by it to the extent of \$3,655.82 and did not shift such burden in any manner whatsoever.

The Court below considered that the decision of the Board was favorable to Webre on the basis of the presumption alone (R. 74); and in effect that, with the presumption gone, the finding of the Board stood unsupported by the evidence. In this the Court was in error.

Assuming the presumption to be dissolved, it is fundamental that *the facts upon which the presumption is based remain as a foundation for any inference which the trier of the facts might justifiably draw.* The difference is

simply this: With the presumption in, the Board, as the trier of the facts, must draw the prescribed inference from the proved facts; with the presumption out, the Board could but is not compelled to draw the same inference.

Therefore, the fact that Webre's margin of profit during the tax period was \$.00162 per unit less than during the period before and after the tax was a fact still in the case; and, as already indicated, the Supreme Court in the *Annis-ton Manufacturing Company* case says that the comparison between the result of operation during the tax period and the period before and after the tax are not irrelevant. These facts are still in the case, and it is for the trier of the facts,—that is the Board, and not the Court,—to determine how much weight should be given thereto.

The Court Below Improperly Held that the 1936 Crop Experience Was Not to Be Considered Relevant.

The statutory margin computation in the case at bar for the period before and after the tax is actually confined to the period before the tax as, the petitioner did no processing during the period six months after the tax—neither did any other maker of sulphitated sugar as such business is purely seasonal and confined to the period October to January, the grinding season. Furthermore, the period before the tax is not a period in which all factors excepting the tax are the same as during the tax period. The quota system and its admitted effect on prices is but one outstanding difference.

Not only is the 1936 crop—the entire processing that took place between the period February 1936 to August 31, 1937—comparable in every respect to the tax period for the reason that the quota system was continued throughout that entire period, and, therefore, is a proper rebuttal of the margin comparison with the period before the tax; but it is also proper to substitute such period for the period before the tax.

The 4th C. C. A. has had the question of other periods than the statutory periods before it in two cases and in each case decided in favor of the taxpayer. In *Morris M. Epstein v. Guy T. Helvering*, 120 Fed. (2d) 427, decided June 10, 1941, the Court excluded from the margin computation the period after the tax and allowed a refund based on the period before the tax. The Court said at page 430:

"It is manifest from these figures that a comparison of the statutory margin does not furnish a reliable method for the solution of the issue in this case. Such a method is of no value unless throughout the successive periods, all the factors, except the tax, entering into the manufacture and sale of the goods remain constant. * * *

And in *Arkwright Mills v. Commissioner*, 127 Fed. (2d) 465, decided December 18, 1941, the Court permitted the use of a period thirty months after the tax for comparison purposes. The Processing Tax Board had rejected this testimony and the Court said:

"* * * The evidence was rejected simply on the ground that in the judgment of the Board it was not the type of proof required by the statute to rebut the statutory presumption. In this action there was error. The statute permits the use of any evidence which is pertinent to the questions to be determined. The evidence offered was pertinent and possessed of probative force, and would have justified a finding in the claimant's favor."

In the case at bar, the effect of the quota system, the removal of overhanging supplies, the exhaustion of quotas resulting in the elimination of year end supplies are all factors that distinguish the period before the tax from the tax period; whereas during the 1936 crop as in the tax period the quota was effective.

CONCLUSION.

For the reasons stated in the foregoing petition and supporting brief, it is respectfully submitted that this petition for writ of certiorari should be granted.

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APPENDIX.

Revenue Act of 1936, c. 690, 49 Stat. 1648:

TITLE VII—REFUNDS OF AMOUNTS COLLECTED UNDER THE AGRICULTURAL ADJUSTMENT ACT.

Sec. 902. CONDITIONS ON ALLOWANCE OF RE- FUND.

No refund shall be made or allowed, in pursuance of court decisions or otherwise, of any amount paid by or collected from any claimant as tax under the Agricultural Adjustment Act, unless the claimant establishes to the satisfaction of the Commissioner in accordance with regulations prescribed by him, with the approval of the Secretary, or to the satisfaction of the trial court, or the Board of Review, in cases provided for under section 906, as the case may be—

(a) That he bore the burden of such amount and has not been relieved thereof nor reimbursed therefor nor shifted such burden, directly or indirectly, (1) through inclusion of such amount by the claimant, or by any person directly or indirectly under his control, or having control over him, or subject to the same common control, in the price of any article with respect to which a tax was imposed under the provisions of such Act, or in the price of any article processed from any commodity with respect to which a tax was imposed under such Act, or in any charge or fee for services or processing; (2) through reduction of the price paid for any such commodity; or (3) in any manner whatsoever; and that no understanding or agreement, written or oral, exists whereby he may be relieved of the burden of such amount, be reimbursed therefor, or may shift the burden thereof; or

(b) That he has repaid unconditionally such amount to his vendee (1) who bore the burden thereof, (2) who has not been relieved thereof nor reimbursed therefor, nor shifted such burden, directly or indirectly, and (3) who is not entitled to receive any reimbursement therefor from any other source, or to be relieved of such burden in any manner whatsoever. (U. S. C. 1940 ed., Title 7, Sec. 644.)

Sec. 903. FILING OF CLAIMS.

No refund shall be made or allowed of any amount paid by or collected from any person as tax under the Agricul-

tural Adjustment Act unless, after the enactment of this Act, and prior to July 1, 1937, a claim for refund has been filed by such person in accordance with regulations prescribed by the Commissioner with the approval of the Secretary. All evidence relied upon in support of such claim shall be clearly set forth under oath. The Commissioner is authorized to prescribe by regulations, with the approval of the Secretary, the number of claims which may be filed by any person with respect to the total amount paid by or collected from such person as tax under the Agricultural Adjustment Act, and such regulations may require that claims for refund of processing taxes with respect to any commodity or group of commodities shall cover the entire period during which such person paid such processing taxes. (U. S. C. 1940 ed., Title 7, Sec. 645.)

Sec. 906. PROCEDURE ON CLAIMS FOR REFUND OF PROCESSING TAXES.

(a) Notwithstanding any other provision of law, no suit or proceeding, whether brought before or after the date of the enactment of this Act, shall be brought or maintained in any court for the refund of any amount paid or collected as processing tax, as defined herein, under the Agricultural Adjustment Act, except as provided in this section. The Commissioner shall allow or disallow, in whole or in part, any claim for refund of any such amount within three years after such claim was filed, unless such time has been extended by written consent of the claimant.

(b) There is hereby established in the Treasury Department a Board of Review (hereinafter referred to as "the Board"). The Board shall be composed of nine members who shall be officers or employees of the Treasury Department designated by the Secretary of the Treasury. * * * The Board shall have jurisdiction in proceedings under this section to review the allowance or disallowance of the Commissioner of a claim for refund, and to determine the amount of refund due any claimant with respect to such claim. The Commissioner shall make refund of any such amount determined by decision of the Board which has become final. The proceedings of the Board and its divisions shall be conducted in accordance with such rules and regulations as the Board may prescribe, with the approval of the Secretary.

(c) The allowance or disallowance of the Commissioner of a claim for refund under this section shall be final, unless within three months after the date of mailing by registered mail by the Commissioner of notice that a claim for refund of any such amount has been disallowed, in whole or in part, the claimant files a petition with the Board requesting a hearing on the merits of his claim, in whole or in part.

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(g) A review of the decision of the Board, made after the hearing provided in this section, may be obtained by the claimant or Commissioner by filing a petition for review in the Circuit Court of Appeals of the United States within any circuit wherein such claimant resides, or has his principal place of business, or, if none, in the United States Court of Appeals for the District of Columbia, or any such court which may be designated by the Commissioner and the claimant by stipulation in writing, within three months after the date of the mailing to the claimant and the Commissioner of the copy of the findings and decision of the Board. A copy of such petition shall forthwith be served upon the Commissioner or upon any officer designated by him for that purpose, or upon the claimant, according to which party files such petition, and upon the Board. Thereupon the Board shall certify and file in the court in which such petition has been filed, a transcript of the record upon which the findings and decision complained of were based. Upon the filing of such transcript such court shall have exclusive jurisdiction to affirm the decision of the Board, or to modify or reverse such decision, if it is not in accordance with law, with or without remanding the cause for a rehearing, as justice may require. No objection shall be considered by the court unless such objection shall have been urged before the Board or division and the presiding officer, or unless there were reasonable grounds for failure so to do. If the claimant or the Commissioner shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material, and that there were reasonable grounds for failure to adduce such evidence in the hearing before the presiding officer, the court may order such additional evidence to be taken before such officer, and to be adduced upon the hearing in such manner and upon such

terms and conditions as to the court may seem proper. The Board may modify its findings of fact and decision by reason of the additional evidence so taken and it shall file with the court such modified or new findings and decision. The judgment of the court shall be final, subject to review by the Supreme Court of the United States, upon certification or certiorari as provided in sections 239 and 240 of the Judicial Code, as amended. Such courts are authorized to adopt rules for the filing of petitions for review, the preparation of the record for review, and the conduct of the proceedings on review. If the decision of the Board is affirmed, costs shall be awarded against the claimant, and if such decision is reversed, the judgment shall provide for a refund of any costs paid by the claimant. In case of modification of such decision costs shall be awarded or refused as justice may require. The decision of the Board made after the hearing provided herein shall become final in the same manner that decisions of the Board of Tax Appeals become final under section 1005 of the Revenue Act of 1926 as amended. (U. S. C. 1940 ed., Title 7, Sec. 648.)

Sec. 907. EVIDENCE AND PRESUMPTIONS.

(a) Where the refund claimed is for an amount paid or collected as processing tax, as defined herein, it shall be prima facie evidence that the burden of such amount was borne by the claimant to the extent (not to exceed the amount of the tax) that the average margin per unit of the commodity processed was lower during the tax period than the average margin was during the period before and after the tax. If the average margin during the tax period was not lower, it shall be prima facie evidence that none of the burden of such amount was borne by the claimant but that it was shifted to others.

(b) The average margin for the tax period and the average margin for the period before and after the tax shall each be determined as follows:

(1) *Tax period.*—The average margin for the tax period shall be the average of the margins for all months (or portions of months) within the tax period. The margin for each such month shall be computed as follows: From the gross sales value of all articles processed by the claimant from the commodity during such month, deduct the cost of

the commodity processed during the month and deduct the processing tax paid with respect thereto. The sum so ascertained shall be divided by the total number of units of the commodity processed during such month, and the resulting figure shall be the margin for the month.

(2) *Period before and after the tax.*—The average margin for the period before and after the tax shall be the average of the margins for all months (or portions of months) within the period before and after the tax. The margin for each such month shall be computed as follows: From the gross sales value of all articles processed by the claimant from the commodity during such month, deduct the cost of the commodity processed during the month. The sum so ascertained shall be divided by the number of units of the commodity processed during such month, and the resulting figure shall be the margin for the month.

(3) *Average margin.*—The average margin for each period shall be ascertained in the same manner as monthly margins under subdivisions (1) and (2), using total gross sales value, total cost of commodity processed, total processing tax paid, and total units of commodity processed, during such period.

(4) *Combination of commodities.*—Where, as for example, in the case of certain types of tobacco, the articles produced and sold by the claimant are the product of several commodities combined by him during processing, the average margins shall be established with respect to such commodities as a group, and not individually, in accordance with rules and regulations prescribed by the Commissioner, with the approval of the Secretary of the Treasury.

(5) *Cost of commodity.*—The cost of commodity processed during each month shall be (a) the actual cost of the commodity processed if the accounting procedure of the claimant is based thereon, or (b) the product computed by multiplying the quantity of the commodity processed by the current prices at the time of processing for commodities of like quality and grade in the markets where the claimant customarily makes his purchases.

(6) *Gross sales value of articles.*—The gross sales value of articles shall mean (a) the total of the quantity of each

article derived from the commodity processed by the claimant during each month multiplied by (b) the claimant's sale prices current at the time of processing for articles of similar grade and quality.

(7) The quantity of each article derived from the commodity processed may be either (a) the actual quantity obtained, as shown by the records of the claimant, or (b) an estimated quantity computed by multiplying the quantity of commodity processed by appropriate conversion factors giving the quantity of articles customarily obtained from the processing of each unit of the commodity.

(c) The "tax period" shall mean the period with respect to which the claimant actually paid the processing tax to a collector of internal revenue and shall end on the date with respect to which the last payment was made. The "period before and after the tax" shall mean the twenty-four months (except that in the case of tobacco it shall be the twelve months) immediately preceding the effective date of the processing tax, and the six months, February to July, 1936, inclusive. If during any part of such period the claimant was not in business, or if his records for any part of such period are so inadequate as not to provide satisfactory data on prices paid for commodities purchased or prices received for articles sold, the average prices paid or received by representative concerns engaged in a similar business and similarly circumstanced may with the approval of the Commissioner, where necessary for a fair comparison, be substituted in making the necessary computations. If the claimant was not in business during the entire period before and after the tax, the average margin, during such period, of representative concerns engaged in a similar business and similarly circumstanced, as determined by the Commissioner, shall be used as his average margin for such period.

(d) If the claimant made any purchase or sale otherwise than through an arm's length transaction, and at a price other than the fair market price, the Commissioner may determine the purchase or sale price to be that for which such purchases or sales were at that time made in the ordinary course of trade.

(c) Either the claimant or the Commissioner may rebut the presumption established by subsection (a) of this section by proof of the actual extent to which the claimant shifted to others the burden of the processing tax. Such proof may include, but shall not be limited to—

(1) Proof that the difference or lack of difference between the average margin for the tax period and the average margin for the period before and after the tax was due to changes in factors other than the tax. Such factors shall include any clearly shown change (A) in the type or grade of article or commodity, or (B) in costs of production. If the claimant asserts that the burden of the tax was borne by him and the burden of any other increased costs was shifted to others, the Commissioner shall determine, from the effective dates of the imposition or termination of the tax and the effective date of other changes in costs as compared with the date of the changes in margin (when margins are computed for weeks, months, or other intervals between July 1, 1931, and August, 1936, in the manner specified in subsection (b), and from the general experience of the industry, whether the tax or the increase in other costs was shifted to others. If the Commissioner determines that the difference in average margin was due in part to the tax and in part to the increase in other costs, he shall apportion the change in margin between them;

(2) Proof that the claimant modified existing contracts of sale, or adopted a new form of contract of sale, to reflect the initiation, termination, or change in amount of the processing tax, or at any such time changed the sale price of the article (including the effect of a change in size, package, discount terms, or any other merchandising practice) by substantially the amount of the tax or change therein, or at any time billed the tax as a separate item to any vendee, or indicated by any writing that the sale price included the amount of the tax, or contracted to refund any part of the sale price in the event of recovery of the tax or decision of its invalidity; but the claimant may establish that such acts were caused by factors other than the processing tax, or that they do not represent his practice at other times. If the claimant processed any product in addition to the commodity with respect to the processing of which there was paid or collected an amount as tax for which he claims a refund, and if the Commissioner has reason to believe

that the burden of such amount was shifted in whole or in part by means of the transactions relating to such product, the average margin with respect to such product, and articles processed therefrom, shall also be considered, and shall be determined for the tax period applicable to the commodity and for the period before and after the tax in the manner prescribed in subsection (b) of this section. To the extent the Commissioner determines that the average margin with respect to such product was higher during the tax period than it was during the period before and after the tax, it shall be prima-facie evidence that such amount was not borne by the claimant but that it was shifted to others. (U. S. C. 1940 ed., Title 7, Sec. 649.)

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1944.

No. 148.

WEBRE STEIB COMPANY, LTD., *Petitioner,*
v.
COMMISSIONER OF INTERNAL REVENUE, *Respondent.*

On Certiorari to the United States Circuit Court of Appeals
for the Fifth Circuit.

BRIEF FOR PETITIONER.

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BRIEF FOR PETITIONER.

OPINIONS BELOW.

The Findings of Fact and the Decision, together with the supporting Memorandum (R. 30-42) of The United States Processing Tax Board of Review, wherein this proceeding began, are unreported. The opinion of the United States Circuit Court of Appeals for the Fifth Circuit (R. 73-77) is reported at 140 F. (2d) 768. The denial of the petition for rehearing (R. 84) is unreported.

JURISDICTION.

The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925 (U. S. C. A. Title 28, Section 347), and by the Revenue Act of 1936, Title VII, Section 906(g) (49 Stat. 1750), printed in the appendix hereto.

STATEMENT.

Webre Steib Company, Ltd., herein for convenience sometimes called Webre, was during the period from June, 1932 to January, 1937 engaged in the operation of a plantation, the growing of sugarcane thereon, the purchase of sugarcane from others, and in processing such sugarcane (R. 31). The processing, a seasonal operation beginning in October of each year and ending in December or early January (R. 31), consisted of grinding the sugarcane, extracting the sucrose, and producing a low grade of direct-consumption sugar and edible molasses by the sulphitation process (R. 31).

The Jones-Costigan Act (48 Stat. 670) was enacted on May 9, 1934 and amended the Agricultural Adjustment Act (48 Stat. 31) which was enacted on May 12, 1933. By the Jones-Costigan amendment, a processing tax was imposed on the processing of sugarcane and sugarbeets, effective June 8, 1934. The rate of tax was set by the Secretary of Agriculture at 50 cents per hundred pounds of 96° raw sugar with graduations up and down from the 96° base. On refined sugar the tax approximated 53½ cents per hundred pounds. Webre paid processing taxes in the amount of \$8,169.97 (R. 34) on sugar cane processed during the months of October, November, and December, 1934 and October and November, 1935 (R. 34).

On January 6, 1936, in the case of *United States v. Butler* (297 U. S. 1) this Court declared the processing tax features of the Agricultural Adjustment Act unconstitutional. Thereafter, on June 22, 1936, the Revenue Act of 1936 was

enacted and Title VII (Sections 901 to 917 inclusive) thereof (49 Stat. 1747, et seq.) imposed restrictions on the refunding of the unconstitutional processing tax. The refund was limited to the amount of tax, if any, that the claimant had borne and not been relieved of by passing the tax on or back. Congress provided in Section 907 for a margin computation whereby the tax period was compared with a base period composed of the periods two years before the tax and six months after the tax. The margin computation took into account only the Gross Sales Value at the time of processing of the articles produced from the processing, the cost of the commodity processed, and the processing tax paid. The figure reached by deducting from the Gross Sales Value the cost of the commodity and the tax was divided by the number of units processed in the respective periods to determine the margin per unit. If the resulting margin for the tax period was lower than the margin for the base period, it created a presumption that the claimant had borne the burden of the tax to that extent, and, conversely, if the margin for the base period was lower than for the tax period, it created a presumption that the claimant had not borne any of the burden of the tax.

Fully aware that such a margin test was not conclusive, Congress provided in Section 907(e) that either the taxpayer or the Commissioner could rebut the presumption so established by proof of the *actual extent* to which the tax had been borne or shifted; and further provided that there should be no limitation on the type of proof either party could adduce.

The constitutionality of Title VII was attacked in *Annis-ton Manufacturing Company v. Davis* (301 U. S. 337) without complying with the administrative procedure provided by the said Title VII and this Court in an exhaustive opinion held that the legislation was constitutional, did not require an impossibility of proof, and that the "permissible, and we think the true, construction of Section 907(e) is that the words 'actual extent' are used in contradistinction to

the *presumed* extent, according to the prima facie presumption to which the proof in rebuttal is addressed." (301 U. S. 355.) Mr. Chief Justice Stone (then an Associate Justice) and Mr. Justice Cardoza reserved their vote as to the constitutional or statutory rights of the taxpayer in the event that it shall be impossible to ascertain whether there has been a shifting of the tax. (301 U. S. 357-8)

Pursuant to statute Webre filed a claim for refund of the processing tax paid (R. 18-26). The Commissioner disallowed the claim, and a petition was filed with the United States Processing Tax Board of Review.

That Board, after a hearing, made findings of fact, among others, to the effect that Webre bore the burden of the tax to the extent of \$3,655.82 (R. 36) and did not shift such burden in any manner whatsoever (R. 36). The Board rendered a decision that Webre was due a refund of \$3,655.82 (R. 36). The amount of refund awarded by the Board was the amount indicated as borne by Webre by the margin computation (Finding No. 11 multiplied by the units appearing in Finding No. 9) (R. 35)—although the Board did not premise its decision on the presumption resulting from the margin computation.

Webre and the Commissioner each filed a motion for rehearing with the said Board (R. 42-46), but the said Board failed to act on such motions before it was abolished by statute on December 31, 1942. Thereafter, The Tax Court of the United States which had acquired jurisdiction by Section 510 of the Revenue Act of 1942 denied the said motions for rehearing (R. 47). From the decision of the Processing Tax Board both parties filed petitions for review in the Circuit Court of Appeals for the Fifth Circuit pursuant to the Revenue Act of 1936, Title VII, Section 906(g).

In addition to those just mentioned, the Processing Tax Board of Review made fact findings amongst others as follows:

(a) That at the beginning of 1933 prices had declined due to an excess of supply of sugar in the various producing countries including large stocks in the United States (R. 33); that early in the year 1933 the domestic and foreign producers, processors and refiners attempted to negotiate a stabilization agreement directed toward controlling supplies of sugar (R. 33); that, such stabilization negotiations—which had the tentative approval of the Department of Agriculture—had the effect of reducing the supply of sugar for market, and the corresponding effect of creating an increase in the price of raw and refined sugar, raw sugar advancing 85 cents per hundred pounds by mid-September, 1933 (R. 33); and

(b) That about the 15th of September, 1933, it became evident the stabilization plans would be abandoned, and the supplies of sugar that had been held in check would be, and in fact were, released (R. 33); that there was a steady decline in refined sugar prices with one slight interruption from August-September 1933 to the first week in June, 1934 just prior to the imposition of the processing tax on June 8, 1934 (R. 34); that this decline was due to a decline in raw sugar prices of 85 cents during the same period and the further contributing fact that the beet sugar crop was 300,000 tons of sugar larger than any previous crop (R. 34); that on the effective date of the processing tax there was a universal increase in the price of sugar of 55 cents per hundred pounds (R. 34); and

(c) That the processing by Webre was seasonal—October to December of each year (R. 31); that the sugar it produced was of low grade (R. 31), which because of its inferior quality was sold by sample (R. 32) at a price averaging 80 cents below the price of standard refined sugar (R. 32); that all sales were through brokers in competition with other manufacturers (R. 32); and, that the product because of poor keeping qualities was all marketed not later than May of each year (R. 32); and

(d) That Webre's statutory tax period began June 8, 1934 and ended November 8, 1935 (R. 34); that the margin for the tax period was \$.01192 per unit (R. 35), for the base period \$.01354 (R. 35); and that the margin for the tax period was lower than it was during the base period by \$.00162 (R. 35); and

(e) That the accounts stated between Webre and its broker showed the processing tax as a separate item and as an addition to the sale price on sales of molasses (R. 35); that the said broker addressed and purportedly mailed to Webre on January 17, 1936 a letter accounting for sales of sugar the last sentence of which reads "Therefore you have not paid any more tax than you collected and these sugars in warehouse here and elsewhere, that is Chicago, or [are] really tax free."

Important too, are undisputed facts, established by the evidence, that the Board failed to find. These facts have been stipulated by the respondent for the record on review (R. 65-67). They are:

(a) That Webre did no processing during the period six months after the tax (Par. 1, R. 66);

(b) That the facts and figures set forth in the Board's finding No. 10 (R. 35) stated to represent the base period, are, in fact, applicable only to the period two years before the tax (Par. 2, R. 66);

(c) That the quota system under the Agricultural Adjustment Act, as amended, was in full force and effect during the period June 8, 1934, to and beyond January 3, 1937 (Par. 3, R. 66); and

(d) That the first processing done by Webre after January 6, 1936—the date of invalidation of the tax—was the processing of the 1936 crop during the period October 27, 1936 to January 3, 1937 and that the average margin for the 1936 crop computed in the same manner in every respect as the statutory margins, was \$.01582 per unit (Par. 4, R. 66-67).

The Commissioner appealed to the Circuit Court of Appeals. That Court reversed the judgment of the Processing Tax Board of Review on the ground that the universal price increase on the effective date of the tax and the broker's letter to Webre *dissolved* the presumption created by the margin computation (R. 77).

Webre appealed to the Circuit Court of Appeals on the grounds that the margin and refund determined by the Board was a minimum sum; that the findings actually made with respect to the period two years before the tax rebutted the balance of the margin that was unfavorable to Webre; and that the 1936 crop was proper rebuttal evidence and revealed that Webre bore the full burden of the tax. The Circuit Court held that the findings with respect to the two years before the tax at best would make the statutory presumption inapplicable (R. 75-6) instead of accounting for the balance, and that the 1936 crop experience could not be used as a comparison or rebuttal (R. 75).

Webre's contentions are that the Court erroneously held the statutory *prima facie* showing is completely dissolved and loses all probative effect upon the presentation of any evidence tending to rebut it; that the Court erred in failing to treat the 1936 crop experience as proper rebuttal; that the Court erred in failing to hold that the margin showing resulting from the two years before the tax was a minimum margin; that the Court erred in failing to hold that the variance in such factors was proper rebuttal of the unfavorable part of the margin, and that the Board's Findings require a decision that Webre bore the full burden of the tax.

ERRORS ASSIGNED.

The questions brought forward by the Petition for Certiorari encompass the following errors that are intended to be urged, and the said errors are a restatement of the errors set forth in the Brief accompanying the Petition for Certiorari:

1. The Court below erred in construing the "prima facie evidence" and the "presumption" arising from the margin computations prescribed by Section 907 as being wholly dissolved and as having no probative force when any substantial evidence tending to rebut the presumption is introduced.

2. The Court below erred in holding that the evidence submitted by the Commissioner was sufficient to rebut the prima facie showing made by Webre resulting from the margin computations made pursuant to Section 907(a).

3. The Court below erred in holding that the Commissioner could rebut the prima facie evidence arising from the margin computations in any manner other than "by proof of the actual extent to which the claimant (Webre) shifted to others the burden of the processing tax," as required by Subsection (e) of Section 907.

4. The Court below erred in overturning the Board's Finding of Fact that Webre bore the burden of the tax to the extent of \$3,655.82 because this finding of the Board is supported by substantial evidence independent of the presumption arising under Section 907.

5. The Court below erred in holding that the statutory presumption would be inapplicable upon a showing that factors not considered in the computation account for the spread between the margin showing and the amount of tax paid by Webre.

6. The Court below and the Board erred in holding that the 1936 crop experience of Webre could not be used to show, by comparison with the tax period, that Webre bore a greater part of the burden of the tax than is indicated by the margin computation.

SUMMARY OF ARGUMENT.

I.

The invalidation of the processing tax features of the Agricultural Adjustment Act by this Court in *United States v. Butler* (297 U. S. 1) on January 6, 1936 gave rise to fiscal problems of the greatest magnitude. The Government had collected a sum approximating one billion dollars. The Agricultural Adjustment Act when enacted in 1933 was designed to raise prices, have the consumer absorb the tax, and help agriculture. A year later sugar was added to the list of basic agricultural commodities—but in this instance the declared policy was to prevent the passing on of the tax to the consumer. Section 21(d) of the Agricultural Adjustment Act had been enacted (49 Stat. 770) and provided that no processing taxes should be refunded unless the processor proved that he bore the burden of such taxes. This section was attacked in the courts principally on the grounds that no method was suggested whereby processors could prove that they bore the burden of the tax. It was necessary to devise a means to refund the taxes collected that had in fact been borne by the processor and to prevent unjust enrichment where the tax had been shifted.

No reason existed, at the time the tax was levied, for believing that recording information of the tax burden borne or shifted might be of future benefit. Still, a fair test had to be provided to protect the Revenue and do justice to taxpayers. Section 907 of the Revenue Act was designed to meet that need.

II.

Section 907, properly applied, provides a fair and just means of determining the ultimate question of whether or not the processor bore the burden of the tax, and to what extent. First it provides for a comparison of tax period results with a test period composed of the period two years

before the tax and the period six months after the tax. This test includes the primary elements needed to determine the question of tax shift. However, the period 1931 to 1936 was a period of vast economic changes. The test provided resolved a substantial number of cases, but it could not be considered conclusive, although it did constitute a *prima facie* showing. The statute provided further that the taxpayer and the Commissioner could each show that other factors affected the margin resulting from the comparison of the test period with the tax period. The statute suggests various factors that may be adduced to correct the margin showing, but is very specific in providing that proof shall *not* be limited to the enumerated factors. Full freedom of proof is allowed the taxpayer and the Government.

III.

The result of the margin computation under Section 907 creates a presumption of tax burden borne or shifted—either side may rebut that presumption. The presumption flows from actual evidence that is not negated by the rebuttal evidence—it is evidence, substantial evidence, of the taxpayer's experience. It is not a presumption in the ordinary sense of the term. For example, the law presumes death after an unaccounted absence of seven years and testimony establishing the fact that the person was heard from or seen during that period will dispel that presumption. It disappears because the rebutting evidence destroys the premise from which the presumption springs. Likewise, for estate tax purposes gifts made within two years of death are presumed to be made in contemplation of death, but rebutting testimony establishing the decedent's death as accidental will dissolve the presumption because the rebutting evidence removes the premise on which the presumption rests. Such is not the case with the presumption that arises from Section 907. The gross sales value is still the gross sales value, the cost of commodity is

still the cost of commodity, the amount of tax paid is still the same and so is the number of units processed. Every element or factor that gives rise to the presumption remains even though rebuttal evidence is offered. The rebuttal evidence does not destroy the presumption or the evidence from which it springs. The rebuttal evidence supplements the evidence forming the presumption and either outweighs the evidence creating the presumption or, conversely, fails to disturb the presumption.

THE PRESUMPTION ESTABLISHED BY STATUTE IN SECTION 907 IS A LEGISLATIVE PRONOUNCEMENT THAT THE MARGIN EVIDENCE, UNLESS REBUTTED, IS SUFFICIENT TO FORM THE BASIS OF A JUDGMENT. IT IS NOT A SUBSTITUTE FOR EVIDENCE.

An attack on the correctness of the factors that result in the margin presumption does not destroy the presumption—it serves to correct the presumption so that the revised figures will then create the presumption provided by the statute. A correct computation, pursuant to statute, is the only presumption the statute authorizes—there are no alternate presumptions.

Under these circumstances, the presumption and the evidence from which it springs remains in the case at all times. It is the keystone from which adjustments flow. Rebuttal evidence may modify the effect of the presumption, or it may serve as a basis from which to account for the balance of the spread in margins. It is the yardstick with respect to which all rebuttal evidence is measured.

The presumption, therefore, remains until it is overcome by other evidence—it is not dissolved nor does it disappear because the rebuttal evidence does not destroy the evidence from which the presumption flows. At best the rebuttal evidence outweighs the evidence from which the presumption springs.

In the case at bar the Court below held the presumption in favor of Webre dissolved by evidence of a price rise by the industry on the effective date of the tax, and by a purported letter from Webre's broker pertaining to sugar on hand on the date of invalidation—January 6, 1936 (R. 77).

The Court went further. It held that with the presumption dissolved "there was no other proof to support any refund" (R. 77). All the evidence from which the presumption arises was eliminated from the case; all the findings of the Board regarding the factors affecting the margin were overthrown; and the Board was sustained in its decision that the 1936 crop was not the kind of rebuttal contemplated by the statute.

By the holding of the Court below not a scintilla of evidence remained on behalf of the taxpayer. It removed from the case—instead of weighing as the Board did—all the evidence that gave rise to the presumption. We submit that the evidence—of sufficient weight to give rise to the presumption—remains as evidence to prove the actual extent of the tax burden borne or shifted, even if the presumption is lost.

The evidence on which the margin computation is based has prebative value—Congress has seen fit to clothe it with primary importance. That being so, in order to comply with the theory of the holding of the Court below it would be necessary to adduce the same evidence twice in the one trial—once to establish the presumption, and again to establish the actual extent of the burden borne or shifted after the presumption has been rebutted. We do not believe that evidence, admissible for both purposes (presumption and actual extent), must be repeated to remain in the record.

IV.

The Commissioner did not rebut the presumption established by the margin computation. He offered evidence of the nature provided by Section 907 (e)(2); but the record

clearly shows—as provided by statute—that the factors accounting for such evidence were factors other than the tax.

The Commissioner offered evidence of a price increase on the effective date of the tax. The record shows that the taxpayer was not in the market at the time the price level was raised; and, that by the time Webre reentered the market four and one-half months later prices had dropped below the level prevailing the year before the tax. The Commissioner introduced correspondence that the Court below has construed as indicating a tax shift at the end of the tax period; but, the record shows that Webre received higher prices after the tax was invalidated. The record clearly shows that the price advance at the beginning of the tax period was due to the quantity control by quotas established by statute, and, that the quota system continued after the invalidation of the tax; likewise that prices instead of declining actually advanced upon invalidation of the tax.

Hence, we say that the evidence offered by the Commissioner—even though it be of the nature set forth in the statute—was, under the specific facts found by the Board in the case at bar, insufficient to overcome the *prima facie* presumption established by the margin computation.

V.

The Court below erred in reversing the Board in its holding that Webre bore the burden of the tax to the extent of \$3,655.82, as that decision was based on substantial evidence, and the Court below and the Board both erred in holding that the factors affecting the margin computation during the period two years before the tax and the 1936 crop experience did not constitute proper rebuttal testimony.

The respondent in his brief in the Court below rests his case entirely on the defense that the tax was passed forward to the consumer. The Government states (Br. 35).

“There is no contention that the burden was passed back in the instant case. Our defense here is based upon

the actual showing that the processor passed the tax forward to the consumer."

We concern ourselves, therefore, only with the Findings of Fact made by the Board insofar as they bear on a forward shift of the tax.

The record discloses that: (a) the margin was \$.00162 lower in the tax period than it was during the base period (R. 35); (b) Webre did no processing during the six months after the tax part of the base period (R. 66, 75); (c) prices were low at the outset of 1933 (R. 33); (d) stabilization efforts involving a quota increased prices 85 cents per hundred pounds by mid-September 1933 (R. 33); upon abandonment of the stabilization negotiations in mid-September 1933 a decline set in which continued until the effective date of the tax and amounted to 85 cents (R. 33-34); the 1933 beet sugar crop yielded 300,000 tons of sugar more than any preceding crop (R. 34); (e) the price increase of 55 cents per hundred pounds by the industry on the effective date of the tax (June 8, 1934) (R. 34) was coincident with the establishment of quotas controlling the quantity of sugar available (48 Stat. 672-674) (infra 72-76); the quota was in effect throughout the tax period and continued in effect throughout the processing of the 1936 crop (R. 66); (f) the margin for the 1936 crop was \$.01582 (R. 66-67) and by comparison with the tax period shows that Webre bore the entire burden of the tax; (g) the Gross Sales Value per unit of all products derived from the commodity processed amounted to: for the period two years before the tax, \$.02973 (computed from Finding No. 10, R. 35); for the tax period, \$.03326 (computed from Finding No. 9, R. 35); for the 1936 crop, \$.03351 (R. 66); (h) the amount actually realized by Webre, per ton of cane ground, for the respective periods is as follows: 1932 crop, \$4.16 (R. 24); 1933 crop, \$5.55 (R. 24); 1934 crop, \$5.18 (R. 24); 1935 crop, \$5.67 (R. 24).

The foregoing facts we believe clearly establish the ultimate fact that Webre bore the entire burden of the tax, and

that the amount realized would have been realized even if there had been no tax. Likewise, that the margin computation, of itself, shows only the minimum amount of burden borne, and that such minimum supplemented by the factors enumerated above form an accounting for the full amount of the tax.

ARGUMENT.

I.

Situation Confronting Congress in Enacting Title VII of the Revenue Act of 1936 (49 Stat. 1747-1753).

The pertinent parts of Title VII, Sections 901 to 907 inclusive are set forth in the Appendix (*infra* pp. 56-66).

The invalidation of the processing tax features of the Agricultural Adjustment Act by this Court in *United States v. Butler* (297 U. S. 1) on January 6, 1936, gave rise to fiscal problems of the greatest magnitude. The Government, under the said Act, had collected approximately one billion dollars. In August of 1935, Congress added Section 21 to the Agricultural Adjustment Act (49 Stat. 770) pursuant to which no refunds could be made of processing taxes unless the claimant could establish that it had borne the burden of the tax. This section of the statute was attacked repeatedly in the courts, principally on the ground that no method was suggested whereby processors could prove that they bore the burden of the tax. When Title VII of the Revenue Act of 1936 was being considered by Congress, it at first contained only a general restrictive provision similar to Section 21(d). The Senate inserted Section 907 as a relief provision to processors. The presumption was created by Section 907 in order to give processors, if they chose to use it, a means of proving tax absorption. It was not intended as a further restriction on their right to a refund. This is apparent from an examination of the Senate Finance Committee Report (Report No. 2156, 74th Congress, 2nd Session, where it is said: (pages 33 and 36)

“ * * * The validity of section 21(d) has been challenged in the courts in several respects. It has been contended that while that section states the conditions under which the Commissioner may deny a refund of taxes paid, it does not establish affirmatively any conditions, compliance with which will enable the claimant to secure a refund. It has been further argued that section 21(d) is so vague and indefinite as not to provide a claimant with an adequate remedy at law for a recovery of the amounts illegally exacted.

Section 907 of Title VII contains provisions under which a claimant may establish a prima facie case for securing a refund and sets forth definite factors and considerations to be taken into account in determining whether or not a claimant bore the burden of the tax for which refund was sought.

Section 907 sets forth presumptions whereby a *claimant may* make out a prima facie case as to the extent to which he bore the burden of the tax, and show that he is entitled to a refund to that extent. * * * (Italics supplied)

Whether the claimant bore the burden of the tax or succeeded in shifting the tax was important, for the reason that the Agricultural Adjustment Act, on original enactment, was expressly designed to raise prices and have the consumer bear the tax. The declaration of policy (48 Stat. 32) sets forth three purposes: (1) to increase prices to the farmer equivalent to the purchasing power of agricultural commodities during the period 1909-1914; (2) to correct the inequities as rapidly as feasible in view of the current consumptive demand in domestic and foreign markets; and (3) to protect the consumer by adjusting production to a level that will not increase the percentage of the consumers' expenditures for agricultural commodities returned to the farmer above the 1909-1914 level. The commodities covered were such as were raised domestically—imports were absent or nominal.

This was not the case when sugar was added a year later—May 9, 1934 (48 Stat. 670). Over 70 per cent of the sugar consumed in this country is imported. The President in his message requesting the legislation (*infra* p. 68) stated: "Consumers need not and should not bear this tax. It is already within the Executive power to reduce the sugar tariff by an amount equal to the tax."

So that the question of who bore the burden of the tax was a vital one. In many instances the processor most likely succeeded in relieving himself of the tax; with regards to sugar, his ability to shift any part of the tax was beset with many difficulties. At the time the tax was levied, no reason existed for believing that recording information of the tax burden borne or shifted might be of future benefit. To meet the objections being interposed to Section 21 (*supra*) of the Agricultural Adjustment Act, and to protect tax payers who had borne the burden of the tax, Congress enacted Section 907 of Title VII of the Revenue Act of 1936.

The administrative departments of the Government as well as Congress recognized that sugar was in a different category than most other agricultural commodities. Following the passage of Section 907, the Bureau of Agricultural Economics prepared for the Bureau of Internal Revenue "An analysis of the effects of the Processing Taxes levied under the Agricultural Adjustment Act." This document is dated May 10, 1937 and states at page 6:

"In the case of sugar, the control system definitely fixed the quantity of sugar made available to consumers during a given period. The processing tax, therefore, did not affect the supply of or demand for sugar in the retail markets, and hence did not affect retail prices and could not have been passed on to consumers."

II.

Section 907 of the Revenue Act of 1936.

Section 907, applied as intended by Congress, provides a fair and just means of determining the ultimate question of whether or not the processor bore any part of the burden of the tax and, if so, the extent thereof.

The broad premise of Section 907 (*infra*, pp. 62-66) is that any decline in unit earnings during the tax period, which is unexplained by other changes, will indicate that the processor bore the burden of the tax to the extent of the decline, while constant or increased earnings will indicate that the burden was shifted. Accordingly, the statute contemplates a comparison of earnings—or margins—during the tax period with those during a representative period before and after the tax. Section 907(a) makes a decrease in the processing margin per unit (the difference between the sales value of the article, after deducting the amount of the tax, and the cost of the raw commodity) *prima facie* evidence that the claimant bore the burden of the tax to the extent of the decrease and, correlatively, an unchanged or increased margin *prima facie* evidence that the tax burden has been shifted. However, the processing margin—even though it contains the major elements of cost and a current sales value—does not necessarily reflect all the elements or factors that result in the margin figure. Section 907(c) provides for a refinement or rebuttal of the margin obtained under Section 907(a). Either the taxpayer or the Commissioner may show that the change or lack of change in the margin was due to factors other than the tax. Section 907(c) suggests definite factors to be taken into account, but expressly states that “Such proof may include, but shall not be limited to—” the enumerated factors. The result is that either the taxpayer or the Commissioner may take account of all factors which affect the processing margin, and—except for the impossibility of reducing some factors to a dollar and cents exactness—any remaining varia-

tion must be due to the only new factor, the processing tax.

Section 907(e) in authorizing adjustment of the margins by refining or rebutting evidence uses the phrase "proof of the actual extent to which the claimant shifted to others the burden of the processing tax." This Court in *Anniston Manufacturing Co. v. Davis* (301 U. S. 337) at page 355 states:

"The permissible, and we think the true, construction of section 907(e) is that the words '*actual extent*' are used in contradistinction to the *presumed* extent, according to the *prima facie* presumption to which the proof in rebuttal is addressed. In the light of the context, and of the entire scheme of the administrative proceeding, we are of the opinion that the provision was intended to afford, and does afford, full opportunity to the claimant to present any evidence which may be pertinent to the questions to be determined by the Board of Review and which may be appropriate to overcome any presumption which might be indulged either under section 907 (a), 7 U. S. C. A. § 649 (a) or otherwise."

The margin itself, is determined as follows: The "Gross Sales Value of articles" derived from the commodity processed (Section 907(b)(6)) at the time of processing is ascertained. The total quantity of each article derived from the commodity processed is multiplied by the claimants sale price current at the time of processing for articles of similar grade or quality. The value so determined may or may not be the sum realized on sale of the articles. It is the price current at time of processing. However, any material variance would be a proper rebuttal of the margin computation—it would not destroy or dissolve the margin computation—it would be a proper adjustment of one of the factors affecting the margins.

From the gross sales value there is deducted the cost of the commodity and the processing tax paid, if any, and the balance is the margin figure, which upon being divided by the number of units processed during the period results in the average margin per unit.

These factors are generally the most important single items in determining the processor's earnings, and may be taken as a starting point. The respondent in his brief to this Court in *Anniston Manufacturing Company v. Davis* (*supra*) states at page 151:

"If, for any reason, this marginal approach is unsatisfactory, the taxpayer may, under Section 907 (c), allow for demonstrated error or else adopt any other method of proof more appropriate for the facts of his particular case."

The test provided by Section 907 is the margin for the period during which a tax was paid with a base period composed of the period two years before the tax, which in the instant case is June 8, 1932 to June 8, 1934, and the period six months after the tax, that is, February to July, 1936, inclusive (Section 907 (c) (*infra*, p. 64)). For some commodities the test period begins as early as August, 1931. The depressed conditions existing in 1931, 1932, and 1933 are too well known to require comment, and Congress undoubtedly had this in mind when it added the period of six months in 1936. The purpose, obviously, was to balance the test period and make it more representative with the tax period. In the instant case Webre did no processing during the period six months after the tax (R. 66, 75) and, accordingly, the margins were affected. In other words, the favorable margin found by the Board was an irreducible minimum.

The comparison of the margin for the tax period with the margin for the test period created a presumption under Section 907 (a). It was a starting point from which to take into account adjustments, pro and con, for factors other than the tax that affected the margin computation. Either party had the right to adduce evidence to show wherein the margin, so computed, failed to take into account any factor other than the tax. It is the fairest method yet conceived to protect the taxpayer and the Government. It

availed of mathematical exactness where available and waived such exactness where not available. For instance, gross sales value is not necessarily representative of actual realization on sale nor of the passing on of a tax, but that factor can be shown if it exists. Likewise, if the cost of the commodity cannot be determined, the statute provides (Section 907 (b)(5)) that "current prices at the time of processing" may be used. The same must be true of other factors that affect the margin—if the exact mathematical computation cannot be made, some other factor, such as another period (the 1936 crop) with like conditions, will serve to correct the margin.

The method provided by Section 907 to establish a prima facie case and to refine or rebut the margins is based upon substantial evidence, not inferences. It is evidence that without a statutory presumption is of greater weight—actual experience instead of inferences—than exists in many cases in which courts must approximate damages and give judgment.

III.

Effect of the Presumption Arising Under Section 907.

The Court below disposed of the presumption created by the margin computation partially favorable to Webre in the following language: (R. 76)

"We adhere to our ruling in the *Bain Peanut Company* case that the statutory presumption, when rebutted, disappears entirely from the case; and if there is no proof *aliunde* the presumption, the taxpayer, upon whom the burden of proof lies, must suffer an adverse decision."

The Court below then held (R. 77) that:

"This evidence clearly was sufficient to dissolve the presumption, and since there was no other proof to support any refund, the claim should have been disallowed in its entirety."

All the evidence adduced by Webre with respect to margins, the factors influencing the margin during the tax period, the period two years before the tax, and the 1936 crop margins, were removed from the case, and the record in the eyes of the Court below was bare of any evidence.

The Court below, in holding as it did with respect to the effect of rebutting evidence on the presumption, followed its previous holding in *Commissioner v. Bain Peanut Company* (134 F. (2d) 853). The Court below denied a Petition for Rehearing with a written opinion (134 F. (2d) 858) wherein the majority held that the presumption created by Section 907 is of the nature dealt with in *Mobile, J. & K. C. RR. Co. v. Turnipseed*, (219 U. S. 35) held valid by this Court, and distinguishes that case from *Western & Atlantic Railroad Co. v. Henderson* (279 U. S. 639) wherein this Court held a statutory presumption invalid. From these two decisions the majority concluded that a statutory presumption is *unreasonable* which is given the effect of evidence to be weighed against opposing evidence; and that such a presumption, as between private parties, would violate the due process clause of the 14th Amendment if created by a state statute and the same clause of the 5th Amendment if created by an Act of Congress. The Court concluded that there was no question of due process in the *Bain* case, "but merely a question as to the weight and character of the presumption that Congress intended to create, [but] the difference in the nature of the two presumptions is persuasive in arriving at the legislative intent."

We believe that the Court below missed the real distinction between the presumption upheld in the *Turnipseed* case and the one held to be invalid in the *Henderson* case; and the distinction between both of those cases and the presumption arising under Section 907.

The true distinction between the *Turnipseed* and *Henderson* cases does not support the Court below in its distinctions as advanced in the opinion denying the Petition for Rehearing in the *Bain* case.

The *Turnipseed* case and the *Henderson* case each gave rise to a presumption resulting from a railroad accident—a derailment in the former and a collision at a crossing between the train and a motor truck in the latter. In the *Henderson* case the lower Court held the presumption of negligence remained in the case after testimony refuting negligence was adduced even though no evidence of negligence was offered by the plaintiff. This Court held the statute invalid. In the *Turnipseed* case this Court held the statute valid when applied to this particular case stating in continuation of the part relied on by the Court below in the *Bain* case:

"That a legislative presumption of one fact from evidence of another may not constitute a denial of due process of law or a denial of the equal protection of the law, it is only essential that there shall be some rational connection between the fact proved and the ultimate fact presumed, and that the inference of one fact from proof of another shall not be so unreasonable as to be a purely arbitrary mandate. So, also, it must not, under guise of regulating the presentation of evidence, operate to preclude the party from the right to present his defense to the main fact thus presumed.

* * * * *

Tested by these principles, the statute as construed and applied by the Mississippi court in this case is unobjectionable. It is not an unreasonable inference that a derailment of railway cars is due to some negligence, either in construction or maintenance of the track or trains, or some other carelessness in operation."

So that the *Turnipseed* case is, in fact, authority for the presumption remaining in the case, and not for the dissolution of the presumption.

In the *Henderson* case, nineteen years later, this Court in declaring the statute as construed by a Georgia Court invalid followed the same reasoning, stating at page 642:

"Legislation declaring that proof of one fact or group of facts shall constitute prima facie evidence of an ultimate fact in issue is valid if there is a rational connection between what is proved and what is to be inferred. A prima facie presumption casts upon the person against whom it is applied the duty of going forward with his evidence on the particular point to which the presumption relates. A statute creating a presumption that is arbitrary, or that operates to deny a fair opportunity to repel it, violates the due process clause of the Fourteenth Amendment. Legislative fiat may not take the place of fact in the judicial determination of issues involving life, liberty or property. * * *

The mere fact of collision between a railway train and a vehicle at a highway grade crossing furnishes no basis for any inference as to whether the accident was caused by negligence of the railway company, or of the traveler on the highway, or of both, or without fault of any one."

More recently in *Tot v. United States* (319 U. S. 463) (decided June 7, 1943), this Court reaffirmed its position on statutory presumptions, stating at page 467:

"Under our decisions, a statutory presumption cannot be sustained if there be no rational connection between the fact proved and the ultimate fact presumed, if the inference of the one from proof of the other is arbitrary because of lack of connection."

The *Turnipspeed* case held that the presumption was not dissolved, but was to be considered along with *all* the evidence.

The distinction between the presumption springing from Section 907 and the two railroad injury cases (*Turnipspeed* and *Henderson*) is more pronounced than the distinction between the two latter cases. The presumption springing from Section 907 is not an inference that by legislative fiat presumes a state of fact not reflected in the evidence but inferred or deduced from a primary fact. Nor must we look for a rational *connection* between the fact proved and

the ultimate fact presumed. It is much stronger. The presumed fact, *that the claimant bore or did not bear the burden of the tax*, is established by a complete chain of evidence—the margin computation—that results in the fact that the Congress has clothed with the force of a rebuttable presumption. There is no hiatus—no gap between the proven fact and the presumed fact. THE PRESUMPTION ESTABLISHED BY STATUTE IN SECTION 907 IS A LEGISLATIVE PRONOUNCEMENT THAT THE MARGIN EVIDENCE, UNLESS REBUTTED, IS SUFFICIENT TO FORM THE BASIS OF A JUDGMENT. IT IS NOT A SUBSTITUTE FOR EVIDENCE. If the presumption is rebutted by sufficient evidence, the presumptive effect may or may not be overcome by such rebuttal evidence—depending on the strength of the rebuttal evidence. In any event, the evidence that gives rise to the presumption is not excluded from the case. It does not disappear with the successful rebuttal of the presumption. In the two railroad cases (*Turnipseed* and *Henderson*) the injury, the collision and the derailment did not disappear as evidence—neither does the margin computation under Section 907. In the *Henderson* case there was a failure to sustain a cause of action because no evidence existed to take the place of the presumption; in the *Turnipseed* case the presumption of negligence was weighed with the other evidence, the derailment, to determine liability.

Under Section 907 the margin evidence remains in the case even if on consideration of all of the evidence the presumption is overcome in whole or in part. The Board's decision that Webre bore the burden of the tax to the extent of \$3,655.83 was based on the margin evidence (R. 35, 36) (The amount appearing in Finding number 11 multiplied by the units appearing in Finding number 9) and the Court below erred in holding that there was "no proof *aliunde* the presumption."

This Court in *Anniston Manufacturing Company v. Davis* (301 U. S. 337) recognized the probative value of the margin computation, stating at page 354:

"But it cannot be said that the comparisons set up between the results of operations during the 'tax period' and the 'period before and after the tax' are wholly irrelevant."

Our view is that the presumption and the evidence from which it springs remain in the case at all times as a starting point from which to measure the effect of the rebuttal evidence, whether such evidence be for the purpose of showing that the margin and the presumption do not reflect the full burden borne, or, whether it be for the purpose of showing that the margin and the presumption overstate the amount of tax burden borne.

Such evidence may be capable of exact mathematical computation and account for the difference between the tax paid and the margin showing with mathematical exactness as was done in *Regensburg v. Helvering* (130 Fed. (2d) 507) (2 C. C. A.); or, it may account for the difference or spread by adducing evidence that the entire base period is not alike in all respects with the tax period, as was done in *Epstein v. Helvering* (120 Fed. (2d) 427) (4 C. C. A.); or, it may be done by advancing another period that is alike in all respects with the tax period, as was done in *Arkwright Mills v. Commissioner* (127 Fed. (2d) 465) (4 C. C. A.); or, the presumption may prevail over conflicting rebutting evidence by both parties to the litigation as the majority of the Court held in *Helvering v. Insular Sugar Refining Corporation* (141 Fed. (2d) 713) (D. C. Appeals). In the latter case, the third member of the Court in a dissenting opinion (page 719) held that the presumption was eliminated from the case by the rebuttal evidence, but that the evidence of margins giving rise to the presumption remained in the case as evidence "entitled to no artificial weight."

In not one of the four cases above referred to, reviewed by three different Circuits, was the presumption held to be dissolved. In the one case decided on the presumption—*Insular Sugar Refining Co.*—the presumption was weighed

along with all the evidence. In the other three cases the presumption was overcome and the evidence that gave rise to the presumption remained in the case.

Analyzing these four cases applying Section 907 and the *Anniston* case decided by this Court in the order in which they were decided, we find:

Anniston Manufacturing Company v. Davis (301 U. S. 337) decided May 17, 1937: The Government in its brief to this Court, answering the Petitioner's objections to the presumption created by Section 907, gives the following view: (Br. 152-153)

"Petitioner specifically objects to the presumption based on a comparison of margins because it fails to take into account the possibility of changes in other processing costs (Br. 43-45). It should first be noted that this omission ~~cannot~~ injure the claimant, for he may show these changes under Section 907 (e) and thus modify the result obtained through comparing the margins. The contention thus reduces itself to the assertion that it is irrational to ignore these factors in making the first step which, until explained by further evidence, is *prima facie* evidence of shifting or absorbing the tax burden. So clarified, the contention requires no extended answer. If Congress had required that all of the factors which might affect the processing margin be included, the procedural utility of the presumption would wholly be lost."

The Government appears to agree with us that the margin computation and the presumption is "the first step". It does not suggest that the presumption disappears when rebutted—quite the contrary—it believes "he may show these changes under Section 907 (e) and thus modify the result obtained through comparing the margins."

This Court in deciding the case discusses the presumption at pages 354 to 356, but due to the nature of the case refuses to enter into a speculative inquiry; although it does conclude that the presumption is rebuttable, that the rebuttal proof is not limited, that the words "actual extent" are

used in contradistinction to the "presumed extent", and that the claimant may present any pertinent evidence which may be appropriate to overcome the presumption.

Epstein v. Helvering (120 Fed. (2d) 427) decided by the Fourth Circuit on June 10, 1941: This case pertained to the processing of tobacco. The statutory margin computation was adverse to the claimant, but the Board found that the claimant changed to a popular priced cigar in the period six months after the tax. The Circuit Court analyzed the margins and held that the margin for the period two years before the tax, considered alone, indicated a full absorption of the tax by the claimant. The Circuit Court reserved the question of the effect of the presumption, reversed the Board, and held the claimant entitled to a refund of the full tax paid. In so holding it relied upon a comparison of the margins for the period two years before the tax with the tax period as well as other Findings of the Board. With reference to the complete base period, that is the period before the tax and the period after the tax, the Court said (page 430):

"It is manifest from these figures that a comparison of the statutory margins does not furnish a reliable method for the solution of the issue in this case. Such a method is of no value unless, throughout the successive periods, all the factors, except the tax, entering into the manufacture and sale of the goods remain constant."

It is to be noted that here, although the Court did not pass on the effect of the presumption, it considered and left in the case the evidence from which the presumption arose. It is clear that the Court considered important, if not controlling, the fact that a margin computation for the period before the tax indicated a complete absorption of the tax.

Arkwright Mills v. Commissioner (127 Fed. (2d) 465) was decided by the Fourth Circuit on December 18, 1941. This case involved the processing of cotton. The margin presumption was adverse to the claimant and upon taking into

account increased expenses the margin remained adverse (p. 467). The claimant contended that the intensity of demand existing in the tax period accounted for the adverse margin to the extent of the adverse margin and about one-third of the tax—that increased demand brought about an increased margin, and that selling prices on a rising market increase faster than costs. In support of this contention the taxpayer advanced the period January 1, 1936 to June 30, 1938 in which the cost of commodity, processing costs and demand were about the same as in the tax period. The Board rejected this evidence and the Fourth Circuit reversed. The Court did not discuss the effect of rebutting the presumption but it approved the claimant's method of adjusting the statutory margin, stating at page 462:

"The next step was to apply these conclusions to the facts of the case by adjusting the statutory formula for marginal comparison so as to make allowance for the greater intensity of demand that existed in the tax period as compared with the statutory base period. The demand was the same in the tax period as it was in the thirty month period, and, therefore, the demand in the latter period was compared with the demand in the statutory base period. This was done by comparing the net margins, i.e., the gross margins, less manufacturing costs, in the two periods. The net margin in the statutory base period was subtracted from the net margin in the thirty month period, and the difference was attributed to the greater demand in the last mentioned period. By this method the amount by which the greater demand increased the margin in the tax period was calculated, and the opinion was finally formed that the taxpayer bore the burden of the tax in the minimum sum of \$79,152.17.

The Court reasoned thus: (page 468)

"In the first place it is manifest that the statutory test, which Congress itself devised, involves a comparison of the taxpayer's actual position during the tax period with what it would have been if there had been no tax. Section 907 (a) requires a comparison of the margin

in the tax period with the margin in the base period before and after the tax. If the margin is lower in the tax period, the presumption is that the taxpayer has borne at least a part of the tax. Clearly, this test assumes that all the factors except the tax which affect the margins are the same in both periods, for otherwise the comparison would not show whether the taxpayer bore the burden or not; and this assumption involves the very sort of hypothesis which the Board condemns. That this is true is recognized by high authority. See Statement of Secretary of Agriculture Wallace before Finance Committee on Title VII of the Revenue Act of 1936, Hearings before Committee on Finance, United States Senate, 74th Congress, 2nd Session, on H. R. 12, 395, p. 859; Ferger on Windfall Tax and Processing Tax Refund, *American Economic Review*, March, 1937, p. 52.

Moreover, there is no novelty or vice in the hypothetical approach to the ascertainment of a person's rights or the extent of damage wrongfully imposed upon him. Valuation of property involves the ascertainment of a hypothetical selling price. Breach of contract often involves a hypothetical loss of profits. Personal injury often requires an estimate of earnings that would have been made had the injury not occurred. Frequently the investigation of these matters is of such difficulty that mathematical certainty in the determination of amounts is impossible; but rights are not lost thereby, and it becomes the duty of the courts to find the relevant facts and to base a reasoned judgment upon them."

Here the Court did not eliminate from the record the evidence from which the presumption arises. It permitted the use of that evidence to measure the adjustment in a period outside the statutory period. What is also important is the fact that the court considered as relevant a period outside the statutory period because the factors were shown to be the same as those existing in the tax period.

E. Regensburg & Son v. Helvering (130 F. (2d) 507) decided by the Second Circuit on August 3, 1942. It involved the processing of Tobacco. The statutory margin

computation was adverse to the claimant and the presumption was that the tax had been shifted. The claimant advanced four factors other than the tax to account for the spread in margins. The Board decided such factors were not a proper rebuttal. The four factors were each reduced to an exact mathematical computation and together accounted for more than the spread between margins. The four factors that the Board refused to consider were: a reduction in cost of tobacco, an increase in the percentage of yield of the filler, a decrease in the duty, and two Christmas seasons that fell in the tax period compared to one in the base period.

In this case the Circuit Court construed the presumption in the following language: (page 508-9)

The caption of § 907 is "Evidence and presumptions," and § 907 (c) speaks of the "prima facie evidence" as a "presumption." This might mean that, as soon as the claimant had put in any evidence, the office of the presumption was over; or it might mean that the claimant had the burden of proof. That question was reserved in *Epstein v. Helvering*, 4 Cir., 120 F. 2d 427, but we must decide it here. We think that "presumption" cannot in this connection mean burden of proof because the claimant has that burden anyway; on the other hand the section can hardly mean merely to set up a presumption, because no presumption is necessary against one who has the burden of proof. True, a claimant would be helped by a presumption when the "margin" for the "tax period" is less than that for the "base period," but if no more than that was meant, it is difficult to see why it should have been necessary to speak of any "presumption" when the spread between "margins" was against him. For these reasons we think that the section could not have used presumption in the strict sense, but that it meant that when the spread between "margins" is against the claimant, even though he may in general have otherwise satisfied the conditions of § 902, 7 U. S. C. A. § 644, he must show that the spread was not owing to his shifting the tax.

and then proceeded to analyze each of the four factors adduced by the claimant by ascertaining the extent to which they accounted for the adverse margin and the tax absorbed. The Court started with the adverse margin and termed the difference between that figure and the amount needed to show an absorption of the tax as the "spread" in margins. It did not exclude the margin evidence once the presumption was rebutted—it used the margin evidence and the presumption as a starting point, tested each factor adduced, and held that the Board erred in not considering them.

In reversing the Board and remanding the cause, the Court had this to say with respect to each of the four factors: (page 510)

The reduction in cost of tobacco and in the duty:

"Unless the decline in price was caused by the tax, such an interpretation [that the cost is already considered in the margin computation] would defeat the general purpose of the act, which was to reimburse those who had paid and who had not indemnified themselves indirectly. A fall in the price of the raw material which would have occurred, tax or no tax, is not such an indemnity; the claimant's loss through the tax cannot be said to have been made good by a profit which he would have enjoyed quite as certainly, if there never had been any tax.

For these reasons we think that any decrease in the cost of raw tobacco and in the duty were proper elements to absorb what remained of the spread between 'margins'."

The increase in the percentage of yield from the filler and the extra Christmas season:

"... when the increase in 'gross sales value' is not owing to the claimant's raising his selling price, but to some economy in manufacture disconnected with the tax, or to an accident over which he has no control, there is no reason to deny him the same right to count

it in absorbing the spread between 'margins,' which he has to a decrease in the cost of the commodity. The higher yield from the tobacco and the extra Christmas season were increases of that kind and, so far as proved, should be credited against the spread."

Helvering v. Insular Sugar Refining Corporation (141 F. (2d) 713) decided March 27, 1944 by the United States Court of Appeals for the District of Columbia. This case related to the processing tax on sugar. The margin computation created a presumption that the claimant bore the tax burden to the extent of about fifty per cent. The Government's rebuttal testimony was of the same type as it advanced in the case at bar, that is, the price rise by the industry—while the claimant was out of the market—on the effective date of the tax and correspondence relating to the tax shift. In the *Insular* case the correspondence was much stronger than the isolated letter the Court below relies on in the case at bar. The Board decided the *Insular* case on the presumption and was sustained by the Court of Appeals. The Court stating at pages 715-716:

"* * * the burden of showing 'the extent' of the shifting—if indeed shifting is shown by selling in a current market as to which claimant had no part in making or controlling—is, in the admitted facts of this case, by the statute put on the Commissioner, and it is perfectly clear he has not met it, and in that case the statutory average marginal formula must be applied if the Act of Congress is to be given effect."

The dissenting member of the Court held that the "presumption was 'out of the case' as soon as proof was introduced which would support a finding that claimant shifted the entire burden of the tax" but

"The difference in margins was not eliminated from the case, but it was only evidence, entitled to no artificial weight."

These four cases, all controlled by Section 907—decided by three different appellate Courts—all retain as relevant

the evidence from which the presumption arises. Furthermore, this Court considers such evidence relevant and it is quite clear that no Court has eliminated the presumption created by the margin computation. The Government in the *Amiston* case, the Second Circuit in the *Regensburg* case, and the Fourth Circuit in the *Arkwright* and *Epstein* cases, have considered the margin computation as the starting point from which adjustments are to be made. And the District of Columbia Court of Appeals in the *Insular* case, after weighing the rebuttal evidence, relies on the presumption.

We believe the Fifth Circuit erred in holding the presumption dissolved in the case at bar, and in further holding that there is "no other proof to support any refund" (R. 77).

We conclude our argument on this phase of the issues with this observation. Assuming arguendo that the Fifth Circuit has correctly construed Section 907, so that by the production of evidence tending to rebut the presumption, the presumption is dissolved and the evidence from which the presumption arises is likewise eliminated from the record. Assume further, that the margin and presumption was against the claimant, and that the rebuttal evidence adduced by the claimant was similar to that in the *Regensburg* case, that is, a precise accounting for the margin spread. Under the foregoing conditions the presumption would be rebutted and the margin computation along with the presumption would be removed from the record. On what basis would the taxpayer recover? We submit that on the Fifth Circuit's theory the taxpayer would be unable to recover because he has done no more than rebut the presumption—he has not established that he bore any of the burden of the tax for the reason that the rebuttal is all anchored to the presumption and the margin computation—which is now eliminated from the case. No foundation or starting point exists from which to measure the affirmative burden. The record would show that there were two Christmas seasons

during the tax period. But that fact has no significance unless it is measured by some other fact. With the record void of the number of Christmas seasons in any other comparative period what difference can evidence of the number of Christmas seasons in the tax period make? Must the taxpayer again introduce as evidence the margin computation for the statutory base period in order to have a comparison? Can the taxpayer introduce some other comparative period as Webre did by showing the 1936 crop experience? Does the statutory base period lose all probative value because the presumption has been rebutted? The same rationale applies to the three other factors that account for the spread in margins in the *Regensburg* case.

The only theory upon which the Fifth Circuit can be sustained in its construction of Section 907 is to hold that, on the production of evidence tending to rebut the presumption, the cause must be tried *de novo*. And how is a litigant to know that he must proceed *de novo* unless the trier of the case (the Board Member) first holds that the presumption has been rebutted? Supposing that at some stage of the proceeding, the Board Member directs that the presumption has been rebutted. Must the litigant proceed *de novo* even though the full Board upon consideration of the Member's Findings should hold that the presumption was not rebutted? We do not believe that Section 907 is intended to set successive traps to defeat the claimant.

The foregoing example brings into bold relief the impossible situation created by the Fifth Circuit, but it serves no purpose unless it is reconciled with the situation that prevails in the ordinary case of presumptions. The distinction is clear. The ordinary presumption is not based on evidence—it is a presumed fact serving in lieu of evidence, and the claimant favored by the presumption is aware that upon the presumption being met by evidence he must produce evidence to fill the gap caused by the presumed fact being dissipated. But under Section 907 the litigant has already produced such evidence. The margin computation

is the evidence of his own experience from his own records. That is why we say on the theory of the Fifth Circuit that the evidence must be submitted *de novo*, or, if such evidence loses all probative value—which we are reluctant to believe—what alternative evidence will make it possible for a litigant to recover the illegal exaction?

We believe the conclusion inevitable that the presumption established by statute in section 907 is a legislative pronouncement that the margin evidence, unless rebutted, is sufficient to form the basis of a judgment. It is not a substitute for evidence. Upon rebuttal, the margin evidence and the presumption both continue to remain in the case to be weighed along with all of the evidence.

IV.

The Commissioner Did Not Rebut the Presumption.

The Board in Findings numbered 10 and 11 found the margins for the tax period and the base period (R. 35); and in Finding number 11 found that the margin for the tax period was \$90162 per unit lower than it was during the base period (R. 35).

The rebuttal evidence of the Commissioner is contained in the last paragraph of Finding number 6 (R. 34) and in Finding number 12 (R. 35-36). The last paragraph of Finding number 6 reads as follows: (R. 34)

"Universal increases in the sale price of sugar were effected on the effective date of the Jones-Costigan Amendment to the Agricultural Adjustment Act, hereinabove referred to, by \$.55 a hundred pounds, to cover the amount of tax imposed by said amendment to the act."

and Finding number 12 reads as follows: (R. 35-36)

"All of the accounts stated between the petitioner and its broker, E. A. Rainold, Inc., respecting sales of molasses made through that broker included the processing tax as a separate item and as an addition to the"

sale price of the article. An account sale, typical of all such accounts, respecting the sales of sugar, made through its said broker, bore the following:

Golden Ridge, 100 Pkts. 10,000 \pm @ 3.71c \$371.00
F.O.B. Pltn, Tax Pd.
Tax 0.526c

The figures 0.526c was the prevailing rate of processing tax at or about the time of the rendition of said account.

The following paragraph is from a copy of a letter of E. A. Rainold, Inc., addressed and, purportedly mailed, to the petitioner on January 17, 1936:

"According to memorandum you furnished us on processing tax you paid on 298,017 pounds of sugar, and we have accounted to you for the [three] cars of 800 pockets and part car of 300 pockets and when we get paid for the balance of this part car, or 500 pockets, it will total 3200 pockets or 320,000 \pm in which the processing tax was included in the price. Therefore you have not paid anymore tax than you collected and these sugars in warehouse here and elsewhere, that is Chicago, or [are] really tax free."

The Board concludes its Findings of Fact with Finding number 14, reading as follows: (R. 36)

"The extent to which the processing tax paid and borne by the petitioner and not shifted to others in any manner whatsoever is \$3,655.82."

From the foregoing Findings the Court below concludes: (R. 77)

"* * * there was no showing that this policy of shifting the burden of the tax, thus shown to exist at the beginning and end of the tax period, did not continue throughout the effective period of the taxing statute. This evidence clearly was sufficient to dissolve the presumption, * * *"

We do not believe that the Court below was correct in holding that the foregoing evidence was sufficient to over-

come the presumption created by the statute because the Board had other evidence before it that negated the conclusion adopted by the Court below. Section 907 (c)(2) provides that:

"Proof that the *claimant* * * * changed the sales price of the article * * * by substantially the amount of the tax * * *; but the claimant may establish that such acts were caused by factors other than the processing tax * * *." (Italics supplied)

The record shows that the claimant did not increase prices and that the increase by the industry was due to factors other than the tax.

The Universal increase in the price of sugar by \$.55 a hundred pounds on the effective date of the tax—June 8, 1934.

Claimant's position on June 8, 1934: Webre was entirely out of the business of processing or marketing sugar on June 8, 1934. There is not a scintilla of evidence to indicate that it was concerned about the price of sugar in any manner whatever on that date. On June 8th its operations were confined to the growing of sugarcane on its plantations. Therefore, it did not increase its price of sugar on that date.

The 1933 processing season extended from October 23rd to December 7, 1933 (R. 31). The processing had ceased seven months before the tax effective date. The 1934 processing season did not begin until October 29th, 1934 (R. 34)—a period of four and one-half months after the tax effective date.

The sugar produced by Webre "was of low grade, it was of a slightly higher grade than raw sugar" (R. 31). "Due to its tendency to revert to liquid form with the advent of warm weather, however, it was necessary to market its product as soon after processing as possible, usually not later than May of each year following the grinding season." (R. 31-32) All of its sugar was sold by sample (R. 32) and

the crop from which the processed sample would of necessity be made was still growing on June 8, 1934 in the plantations of Webre and the growers from whom Webre purchased cane. These crops did not mature until four and one-half months after the tax effective date (R. 31).

We think the record is clear that for a period of seven months before the tax Webre did no processing; and, for at least one month before the tax date Webre had no sugar to sell. Not only did Webre have no sugar to sell on the tax date, but, it had no sugar to sell for the next four and one-half months. It is obvious that Webre did not raise prices on the tax effective date—because it was not in a position to sell sugar—for the simple and compelling reason that Webre had no samples to tender.

Industry price situation on June 8, 1934: It is clear that Webre was not in the sugar market in any manner whatsoever on June 8, 1934; and the fact is contrary to the holding of the court below that Webre had "participated in a universal increase in the selling price of sugar, effective as of the moment the processing tax was imposed" (R. 77).

There was an increase of \$.55 per hundred pounds in the quoted price of sugar by the industry on the date of June 8, 1934. This is not denied. But the record shows clearly that such rise was due to factors other than the tax. Section 907 (c) (2) expressly provides "that the claimant may establish that such acts were caused by factors other than the processing tax." Addressing ourselves to the position of the industry as distinguished from the claimant, and assuming that—even though Webre's sugar was sold by sample—Webre's price followed a set discount from the industry price, we find the following facts:

At the outset of 1933 the price of raw sugar was at a low of \$2.80 (R. 33); and voluntary quota and stabilization negotiations were instituted with the tentative approval of the Department of Agriculture. Prices of raw and refined sugar advanced—raw sugar advancing from \$2.80 to about \$3.65 by mid-September 1933 (R. 33). This is an increase

of 85 cents on prospects of a quota compared to an increase of 55 cents on the taxing date when statutory quotas became operative (*infra*, pp. 72-76). About mid-September, 1933, the voluntary quota efforts were abandoned, supplies held in check were released (R. 33), and there was a steady decline in refined sugar prices (R. 34) lasting until the first week of June, 1934 (R. 34). This decline was due to a decline in raw sugar prices of 85 cents (R. 34) accentuated by the size of the beet sugar crop which was 360,000 tons of sugar larger than any preceding crop (R. 34).

On June 8, 1934 the effective date of the tax the industry advanced prices 55 cents. There are a number of factors other than the tax that influenced prices before and on June 8, 1934, but they do not appear of record in this case—so we refrain from discussing them. However, on June 8, 1934, the quota system of control became operative by statute (*infra*, pp. 72-76). It is clear that the price movement was controlled by the quota. It dominated all other factors. At the beginning of 1933, large excess supplies caused extremely low prices (R. 33); then came an advance of 85 cents on the prospects of the quantity being controlled (R. 33); and a decline of 85 cents when the voluntary control failed (R. 34).

All of this price disturbance was remedied, because the legislation effective on June 8, 1934 provided for a strictly controlled quota (*infra*, pp. 72-76) and on June 21, thirteen days after the taxing date the Philippine quota was filled. The Philippine quota amounted to 1,015,186 tons, or about 16 per cent of the annual United States consumption (Report of the Agricultural Adjustment Administration (1934) (pp. 162-165)).

The price advance in list prices on June 8, 1934 of 55 cents, coincident with a strict quota control, was 30 cents less than the advance of 85 cents the year before on prospects of a quota system. It was 30 cents less than the decline that followed the abandonment of a voluntary quota control.

We believe the claimant has met the requirements of Section 907 (c)(2) and established that the price advance of the industry on June 8, 1934 was due to factors other than the processing tax.

Webre's actual experience: We have demonstrated that Webre did not raise prices on June 8th, 1934; and we have established that the increase in the list price by the industry on June 8th was due to factors other than the processing tax. We now carry the record one step further and demonstrate that the price advance by the industry was entirely lost by the time Webre reentered the market late in October, 1934.

The realization by Webre from the sale of all products derived from the sugarcane processed for the 1933 crop—the year before the tax—amounted to \$5.55 per ton of cane (R. 24); and for the 1934 crop the realization was \$5.18 per ton of cane (R. 24). During the first year of the tax Webre realized 37 cents per ton less than it did in the year before the tax. The 1935 crop year was composed of the tax period in part and in part of the period for which the tax was not paid. The realization per ton of cane was \$5.67 (R. 24) and is slightly higher than the year before the tax but bear in mind this was after the excess supplies had been eliminated from the market. In fact:

"It became apparent in October 1935 that the marketings of sugar as contemplated by the quotas would exhaust the normal year-end stocks of refiners and would result in the closing of some refineries during part of December unless remedial action was taken." (Report of the Agricultural Adjustment Administration, 1933 to 1935) (p. 216).

Approaching the question from the margin angle the Gross Sales Value for the entire tax period was \$.03326 per unit (\$75,055.63 divided by 2,256,676) (R. 35) and the Gross Sales Value for the 1936 crop was \$.03351 per unit (R. 66). The quota system remained in effect during the 1936 crop (R. 66).

It must be apparent that Webre has established the fact that the increase in price by the industry in June 1934 was due to factors other than the tax; that such increase was not realized by Webre in marketing the 1934 crop; and that prices were higher after the tax was invalidated than during the tax period, furthermore, the margin computation reflects current prices, therefore includes all price increases.

We conclude, therefore, that the June 8th price increase was not a rebuttal of the margin presumption.

Purported letter of January 17, 1936 and form of account stated.

The Court below reached the conclusion that the form of account between Webre and its broker (not the customer) (R. 35) and the letter of January 17, 1936 from the broker to Webre (R. 35-36) establishes that the tax was being shifted at the end of the tax period (R. 77).

The account form indicates nothing more than the fact that the sugar was tax paid. Bearing in mind that Webre produced a grade of sugar "of a slightly higher grade than raw sugar" (R. 31) and that only direct-consumption sugar was subjected to a processing tax (48 Stat. 671), it was necessary that the broker be in a position to say that the sugar was tax paid. The account sales does not show a separate billing of the tax—neither does it show a deduction of the tax for the purposes of computing a brokerage. It indicates nothing more or less than the fact that the sugar was tax paid sugar.

The letter of January 17, 1936 was written eleven days after the invalidation of the tax by this Court. The law in effect at that time was Section 21(d) of the Agricultural Adjustment Act and it provided that the claimant could recover the tax only if he had borne the burden of the tax. If the claimant had any unsold tax paid sugar, it was entitled to a refund on such sugar. That is obvious because on unsold sugar no one but the processor could bear the burden of the tax. The letter does nothing more than ac-

count for the tax paid sugar and advises Webre that all the tax paid sugar has been sold. The carelessness of the wording of the paragraph is apparent from the two bracketed errors appearing therein.

We submit that this letter is not of sufficient weight to overturn the decision of the Board. The Board, we must assume, considered this letter in reaching the conclusions that Webre bore the burden of the tax to the extent of \$3,655.82.

The Commissioner did not rebut the presumption.

Our position is that the sugar industry would have liked to have shifted the tax but did not succeed in doing so. Counsel knows of cases, not now before this Court, where the claimant hoped for an increase of \$1.25 on June 8, 1934—53½ cents to cover the tax and the balance to cover the decline that preceded the tax. However, the presumption and margin evidence and, most of all, the actual realization are controlling whereas the hopes and intentions are not. In *C. B. Cones & Son Mfg. Co. v. United States* (134 F. (2d) 539) the Seventh Circuit, in disposing of a floor stocks tax case under the Agricultural Adjustment Act, had this to say about correspondence and intentions (page 533):

"The most unfavorable inference which can be drawn from the correspondence is that plaintiff might have, prior to the effective date of the tax, considered or even intended to include it in its sales price. We are of the view, however, that plaintiff's intention or motive is immaterial. Certainly it is not controlling. The question at issue must be determined on the basis of what was actually done."

The statute provides that the presumption may be rebutted "by proof of the actual extent" to which the tax was borne or shifted. We believe as this Court held in *Amiston Manufacturing Co. v. Davis* (301 U. S. 337) at page 355 that the words "actual extent" are used in the statute in contradistinction to the presumed extent, accord-

ing to the prima facie presumption to which the proof in rebuttal is addressed. We also believe that the words "actual extent" should be construed liberally—but they should not be construed in a manner that will overcome the presumption by the mere introduction of evidence of a frivolous nature. The evidence deemed sufficient to overcome the presumption should be substantial and of weight sufficient to prevail over other evidence. Of what value is evidence of a price increase if other evidence establishes that the price realized during the tax period was no higher than the price realized in the year before the tax? Of what value is correspondence that might indicate a tax shift at the end of the tax period if the record shows higher prices prevailing after the tax period?

Hence, we say that the evidence offered by the Commissioner—even though it be of the nature set forth in the statute—was, under the specific facts found by the Board in the case at bar, insufficient to overcome the prima facie presumption established by the margin computation.

V.

The Claimant in the Case at Bar Has Rebutted the Presumption That the Margin Computation Reflects the Full Burden of the Tax Borne.

The theory of Section 907 is that by a comparison of the major elements entering into the making of a profit during the tax period with similar elements for a representative period a starting point is established by which to measure the tax burden borne or shifted. Unless all the factors, excepting the tax, are alike to the same degree, the comparison fails to disclose the full burden borne or shifted. (*Epstein v. Helvering* (120 Fed. (2d) 427). However, the margin computation does establish a solid foundation from which to measure the adjustments necessary to a determination of the ultimate question.

Some cases, such as *E. Regensburg & Sons v. Helvering* (130 Fed. (2d) 507), lend themselves to a precise computation accounting for the spread in margins; others, such as *Epstein v. Helvering* (*supra*), give the answer to the ultimate question by excluding part of the comparison shown to reflect different factors; still others, such as *Arkwright Mills v. Commissioner* (127 Fed. (2d) 465), form the basis for the ultimate fact by comparison of the tax period with another period upon a showing that the statutory comparative period is not representative.

If the two periods selected by the statute are not a fair comparison, that fact can be shown, and by whatever means is then available, the tax burden borne or shifted can be established.

In the case at bar, we believe that the method provided by Section 907 (a) shows the minimum tax burden borne by Webre. We base this statement on a showing of factors existing in the tax period that did not exist in the comparative period provided by statute; and we establish the fact that Webre bore the full burden of the tax by a comparison with the 1936 crop—a period in which all factors excepting the tax were alike.

The Government in its brief defending the constitutionality of Section 907 in *Anniston Manufacturing Company v. Davis* (301 U. S. 337) states at page 151:

"If, for any reason, this marginal approach is unsatisfactory, the taxpayer may, under Section 907 (e), allow for demonstrated error or else adopt any other method of proof more appropriate for the facts of his particular case."

The authorities, excepting the Court below, appear to be very much in agreement that Section 907 offers full opportunity to determine the ultimate question by assailing or adjusting the basic computation provided by that section. We proceed, therefore, to demonstrate why the basic margin computation reflects only the minimum burden of tax

borne by Webre; and then to demonstrate by comparison with a representative period that Webre bore the full burden of the tax. We refer to the 1936 crop which the Board and the Court below excluded from consideration.

At the outset we point out that the statute contemplates that the burden of the tax may be shifted backwards or forwards—however, in the case at bar the Government in its brief to the Court below concedes that the tax was not passed back and affirmatively argues that the tax was passed on. The Government states (Br. 35):

“There is no contention that the burden was passed back in the instant case. Our defense here is based upon the actual showing that the processor passed the tax forward to the consumer.”

We address ourselves, therefore, to the record insofar as is necessary to establish that the burden of the tax was not shifted forward.

The presumption reflects the minimum tax burden borne by Webre.

The Court below excluded from consideration all the evidence we are about to review on the theory that the presumption was dissolved and that “there was no other proof to support any refund” (R. 77). The margin computation and all evidence relating to it was in effect stricken from the record. We have heretofore argued that the Court committed reversible error in so holding; therefore, we will not renew the argument but proceed to a discussion of the evidence.

(a) *Margins*: The Board finds that the margin for the tax period was \$.01192 per unit; that the margin for the base period was \$.01354; and that the margin for the tax period was \$.00162 lower in the tax period than it was during the base period (R. 35). The number of units processed during the tax period was 2,256,676 (R. 35); therefore, the lower margin with no adjustments indicates a tax burden borne

of \$3,566.82 (R. 36). This figure is arrived at by multiplying \$9.0462 (the decrease in margins) by 2,256,676 (the number of units processed in the tax period).

(b) *The base period is incomplete*: The statutory base period is composed of the period two years before the tax—in this case June 8, 1932 to June 7, 1934—and the six months after the tax, February to July 1936 inclusive. We must assume that Congress took due notice that the period two years before the tax was a period of severe depression and that the period six months after the tax was added to balance the period, thereby making the entire base period more representative of the tax period. The tax period, June 8, 1934 to November, 1935 (R. 34), was a period during which the country was emerging from the depression.

Webre, being a seasonal processor, did no processing between the dates of December 6, 1935 and October 27, 1936 (R. 31); therefore, it did no processing during the statutory period after the tax (R. 66, 75).

The statute recognizes this possibility and provides in Section 907(c) that under such circumstances:

"the average prices paid or received by representative concerns engaged in a similar business and similarly circumstanced may with the approval of the Commissioner, *where necessary for a fair comparison*, be substituted in making the necessary computations." (Italics supplied)

There is no other concern engaged in "a similar business and similarly circumstanced." That is natural in a seasonal business processing an agricultural product immediately after harvesting. Webre made its sugar by the sulphitation process "which is continuous for sugarcane to the finished product, there being no intermediate stage at which raw sugar, as such, is produced" (R. 31). However, the inability to produce representative concerns for the purpose of improving the presumption and margin does not preclude giving consideration to the fact that, because of

that reason, the presumption and margin show a minimum amount of burden borne instead of a likely amount.

(c) *Prices were low at the outset of 1933:* (R. 33) The base period in the case at bar started on June 8, 1932. Webre's first processing was from October 17 to December 20, 1932 (R. 31). Prices were extremely low at the outset of 1933 (R. 33).

"The processing tax on sugar became effective on June 9, 1934, as one part of a four-phase program in aid of growers in the United States and Cuba. This program was initiated almost exactly 4 years after the Tariff Act of 1930, under which the duty on Cuban sugar had been increased from 1.765 to 2 cents per pound, raw value. Although this increased the price of sugar in the United States relative to world prices, both domestic and world prices continued to decline after June 1930, and reached an all-time low in 1932.⁹ (Italics supplied) (An Analysis of the Effects of the Processing Taxes levied under the Agricultural Adjustment Act—Prepared by the Department of Agriculture for the Bureau of Internal Revenue, page 66)

There was an "excess supply of sugar in the various producing countries, including large stocks in the United States" (R. 33). The amount realized by Webre on the 1932 crop amounted to \$4.16 per ton of cane compared to \$5.55 cents per ton in the succeeding year (1933) (R. 24).

We believe it a reasonable conclusion that under the foregoing circumstances the year 1932 included in the margin computation and the presumption establishes that the margins derived therefrom are subnormal and a minimum instead of representing a fair comparison.

(d) *Prospects of a voluntary quota increased prices in 1933:* In the spring of 1933 an effort was made by refiners, processors, and growers to control the supply of sugar (R. 33). All domestic and foreign interests were represented (R. 33). The Department of Agriculture encouraged the procurement of an agreement (L. 33). Prices of raw and

refined sugar advanced while supplies were held in check (R. 33). Raw sugar advanced 85 cents by mid-September (R. 33); then the plans were abandoned, supplies released, and prices declined 85 cents (R. 33-34). The quantity of sugar overhanging the market was aggravated by the largest beet sugar crop on record—300,000 tons larger than any preceding year (R. 34). During the tax period the quota control was in effect—it was part of the statute making sugar a basic agricultural commodity (*infra*, pp. 72-76).

This evidence establishes several factors that influenced the margin comparison. It is to be noted that the rise, beginning in spring, culminated in September. Webre did no processing between the dates of December 30, 1932 and October 23, 1933 (R. 31) so that none of this rise is included in the Gross Sales Value in the base period margin computation for Webre. The decline beginning in mid-September was under way for five weeks before Webre started processing so that the Gross Sales Value at the time of processing by Webre for the second year of the base period includes values much below the maximum. These two deductions from the price movement establish that the statutory margin computation represents a minimum tax burden borne.

This price movement having a material adverse effect on the Gross Sales Value entering into the margin computation also adversely affected Webre in the cost of commodity. Webre was a substantial grower of sugarcane and the declining raw sugar price naturally did not reduce the cost of growing cane; whereas the cane purchased by Webre was purchased after the decline was under way five weeks and ceased no later than December 7, 1933 (R. 31) when the decline still had six months to run. High prices for cane and low prices for the sugar quite naturally narrow the margin during the base period. That is one reason why we contend that the statutory margin computation reflects a minimum amount of tax burden borne.

This evidence also measures the effect of the quota system of quantity control. On prospects of a quota, prices

advanced 85 cents (R. 33); and on abandonment of the plan, prices declined 85 cents (R. 33-34); whereas, on the actual imposition of quotas on June 8, 1934, prices advanced only 55 cents (R. 34). The deduction to be drawn from this evidence is quite obvious—the imposition of quotas did not immediately remove the excess supplies, although it did prevent a bad situation from becoming worse, and gradually acted as a corrective. The price advance of 55 cents on June 8, 1934 was due to the quota control. Furthermore, the advance did not hold because Webre realized less per ton of cane from the 1934 crop—\$5.18 per ton (R. 24)—than it did from the 1933 crop when \$5.55 per ton was realized.

(c) *The tax period:* The quota system of control became operative on the effective date of the tax (*infra* 72-76) and the industry succeeded in temporarily raising prices 55 cents a hundred pounds (R. 34). Within thirteen days importations from the Philippines ceased (Report of the Agricultural Adjustment Administration (1934) (pp. 162-165)). The quota continued in effect for the period six months after the tax, that is, the period February to July 1936 (R. 66). By October, 1935 the excess supply of sugar was eliminated; in fact, refiners were threatened with a shutdown for lack of sugar. The Report of the Agricultural Adjustment Administration (1933 to 1935) p. 216 states:

"It became apparent in October 1935 that the marketings of sugar as contemplated by the quotas would exhaust the normal year-end stocks of refiners and would result in the closing of some refineries during part of December unless remedial action was taken."

Here the record shows that the tax period is a contrast instead of a comparison with the statutory base period; also that Webre's base period confined to the two years before the tax failed to reflect the quota and the elimination of the excess supplies during the period six months after the tax.

Conclusion: Each of the five factors set forth above are a proper rebuttal of the statutory presumption and the margin computation. They do not dissolve the presumption nor is the evidence out of the case. They very definitely establish that the tax burden borne is greater than the presumption and the margin computation would indicate. They establish that the presumption and the margin computation establish the minimum amount of tax burden borne.

We believe they also establish that Webre bore the entire burden of the tax—although we have not been content to rest on that. The record shows that the 1936 crop affirmatively establishes that Webre bore the entire burden of the tax.

The 1936 crop experience has probative value to establish, and does establish, that Webre bore the entire burden of the tax.

The Board held that the 1936 crop could not be used to establish the tax burden borne—that it “tends in no way to establish either a prima facie case under the statute or to rebut the prima facie case established by other proof” (R. 40). The Court below held that the 1936 crop served no purpose because the claimant “could not take any other periods for purposes of comparison” (R. 75).

The statute imposes no limitation on the proof to be offered in establishing the actual extent of the burden borne by the claimant—in fact, it specifically recites that proof shall not be limited to the enumerated factors (infra 65). The Fourth Circuit approved the use of a period of thirty months in *Arkwright Mills v. Commissioner* (127 Fed. (2d) 465). This period of thirty months included only six months of the statutory base period. The Government in its brief to this Court in *Anniston Manufacturing Company v. Davis* (301 U. S. 337) advised this Court that the taxpayer may “adopt any other method of proof more appropriate for the facts of his particular case” (Br. 151). This

Court in *Anniston Manufacturing Company v. Davis* (*supra*) held that Section 907 (c) was: (P. 356)

"intended to afford, and does afford, full opportunity to the claimant to present any evidence which may be pertinent to the questions to be determined by the Board of Review and which may be appropriate to overcome any presumption * * *."

Pertinency of the 1936 crop: The 1936 crop represents the first processing done by Webre after the tax period (R. 31). The conditions during the processing of the 1936 crop were similar to those existing in the tax period. The quota system of control remained in effect (R. 66). The excess supplies existing in the period two years before the tax (R. 33) had been eliminated. Section 907 (c) of the statute indicates that the statute contemplates periods that offer "a fair comparison" (intra 64). The base period in this case has been shown to reflect conditions that do not offer a fair comparison. A margin computation based on the 1936 crop is, we believe, pertinent under the circumstances set forth above.

The margin for the 1936 crop, computed in the same manner in every respect as the statutory margins, is \$0.01582 per unit (R. 66-67). The margin for the tax period is \$0.01354 (R. 35). The margin for the tax period is \$0.00228 lower than the margin for the 1936 crop and "reveals that the petitioner [Webre] bore the burden of a greater amount of tax, by \$1,131.14, than it actually paid" (R. 39).

Margins based on a comparison of the tax period with the 1936 crop establish that Webre bore the full burden of the tax.

Viewing the question from the angle of endeavoring to measure the changed conditions beginning with the tax period we find that a comparison of the statutory base period with the 1936 crop discloses a margin for the base period of \$0.01354 (R. 35); and a margin for the 1936 crop

period of \$0.01582 (R. 67), an increase of \$0.00228. Assuming that the statute requires an adjustment of the base period margins instead of making a comparison with the 1936 crop to the exclusion of the base period, we reach an adjusted margin for the base period of \$0.01582, arrived at by adding to the margin for the base period the increase in the 1936 crop (\$0.01354 plus \$0.00228); and a comparison of the adjusted base period of \$0.01582 with the tax period margin of \$0.01192, results in a margin \$0.00390 lower in the tax period than it was during the base period, and a full burden of the tax borne by Webre.

Testing the results by a comparison of the Gross Sales Value alone we find the Gross Sales Value higher after the tax was invalidated than it was for the tax period. The Gross Sales Value for the tax period was \$0.03326 per unit (\$161,853.86 divided by 5,444,064) (R. 35) and the Gross Sales Value for the 1936 crop amounts to \$0.03351 per unit (R. 66).

We contend, therefore, that the 1936 crop experience is pertinent evidence with demonstrated probative value to establish that Webre bore the entire burden of the tax; and that the amount realized on sale would have been realized even if there had been no tax.

During the period from January 6, 1936 to August 1, 1937 the quota control provisions of the Jones-Costigan Sugar Act remained in full force and effect. On September 1, 1937 a new excise tax on sugar went into effect and the quota control system was continued (50 Stat. 903).

We have no less an authority than the President of the United States that a tax amounting to 150 per cent of the processing tax we are concerned with would not affect the price of sugar to the consumer. What affects the price is the quota control system and the amount realized during the tax period would have been realized even if there had been no tax.

The President of the United States in his message to Congress, dated March 1, 1937 (*infra* 78), stated in part:

"Quotas influence the price of sugar through the control of supply; consequently, under a quota regulation of the supply of sugar, a tax may be levied without causing any adverse effect, over a period of time, on the price paid by consumers.

I recommend to the Congress the enactment of an excise tax at the rate of not less than .75 cent per pound of sugar, raw value. I am definitely advised that such a tax would not increase the average cost of sugar to consumers. * * *

In support of the President's recommendations to Congress, Secretary of Agriculture Wallace issued a press release on March 15, 1937 wherein he analyzed the effects of the tax on sugar. That part of the press release is set forth in the Appendix hereto (infra 79-81).

Can any doubt remain that the 1936 crop experience—which confirms the very definite statement of the President to Congress that the tax would not, under the legislative quota system, be passed on—lacks probative value?

CONCLUSION.

All the authorities, excepting the Fifth Circuit, appear to be very much in accord in construing Section 907 in a manner that will permit that section to give the necessary relief and at the same time protect the revenue.

The Government in concluding its brief in *Anniston Manufacturing Co. v. Davis* (301 U. S. 337) asking this Court to uphold the constitutionality of the legislation states at pages 162-163:

"We also admit that an absolute and theoretically perfect precision of analysis of the extent of tax absorption will probably not always be obtained in practice. The accounting and economic problems in some cases will be complex and difficult. * * * However, we entertain no doubt that 'fair and reasonable approximations' can be reached in every case."

We concur in that summation and rest content that the instant case presents no insurmountable difficulties.

WHEREFORE, because of the errors herein mentioned, your petitioner respectfully asks that the decision of the United States Circuit Court of Appeals be reversed on both petitions; and that the decision of the Board be modified to award a refund of the full amount of tax paid, i.e., \$8,169.97.

C. J. BATTER, v

902 American Security Building,
Washington 5, D. C.,

Attorney for Petitioner.

November, 1944.

APPENDIX.

Revenue Act of 1936, c. 690, 49 Stat. 1648, 1747:

TITLE VII—REFUNDS OF AMOUNTS COLLECTED UNDER THE
AGRICULTURAL ADJUSTMENT ACT

SEC. 901. REPEALS.

Sections 21 (d), 21 (e), and 21 (g) of the Agricultural Adjustment Act, as amended, are hereby repealed.

SEC. 902. CONDITIONS ON ALLOWANCE OF REFUNDS.

No refund shall be made or allowed, in pursuance of court decisions or otherwise, of any amount paid by or collected from any claimant as tax under the Agricultural Adjustment Act, unless the claimant establishes to the satisfaction of the Commissioner in accordance with regulations prescribed by him, with the approval of the Secretary, or to the satisfaction of the trial court, or the Board of Review in cases provided for under Section 906, as the case may be—

(a) That he bore the burden of such amount and has not been relieved thereof nor reimbursed therefor nor shifted such burden, directly or indirectly, (1) through inclusion of such amount by the claimant, or by any person directly or indirectly under his control, or having control over him, or subject to the same common control, in the price of any article with respect to which a tax was imposed under the provisions of such Act, or in the price of any article processed from any commodity with respect to which a tax was imposed under such Act, or in any charge or fee for services or processing; (2) through reduction of the price paid for any such commodity; or (3) in any manner whatsoever; and that no understanding or agreement, written or oral, exists whereby he may be relieved of the burden of such amount, be reimbursed therefor, or may shift the burden thereof; or

(b) That he has repaid unconditionally such amount to his vendee (1) who bore the burden thereof, (2) who has not been relieved thereof nor reimbursed therefor, nor shifted such burden, directly or indirectly, and (3) who is not en-

titled to receive any reimbursement therefor from any other source, or to be relieved of such burden in any manner whatsoever.

SEC. 903. FILING OF CLAIMS.

No refund shall be made or allowed of any amount paid by or collected from any person as tax under the Agricultural Adjustment Act unless, after the enactment of this Act, and prior to July 1, 1937, a claim for refund has been filed by such person in accordance with regulations prescribed by the Commissioner with the approval of the Secretary. All evidence relied upon in support of such claim shall be clearly set forth under oath. The Commissioner is authorized to prescribe by regulations, with the approval of the Secretary, the number of claims which may be filed by any person with respect to the total amount paid by or collected from such person as tax under the Agricultural Adjustment Act, and such regulations may require that claims for refund of processing taxes with respect to any commodity or group of commodities shall cover the entire period during which such person paid such processing taxes.

SEC. 904. STATUTE OF LIMITATIONS.

Notwithstanding any other provision of law, no suit or proceeding, whether brought before or after the date of enactment of this Act, shall be brought or maintained in any court for the recovery, recoupment, set-off, refund, or credit of, or counterclaim for, any amount paid by or collected from any person as tax (except processing tax, as defined herein) under the Agricultural Adjustment Act (a) before the expiration of eighteen months from the date of filing a claim therefor under this title, unless the Commissioner renders a decision thereon within that time, or (b) after the expiration of two years from the date of mailing by registered mail by the Commissioner to the claimant a notice of disallowance of that part of the claim to which said suit or proceeding relates. Any consideration or any action by the Commissioner with respect to such claim following the mailing of notice of disallowance shall not operate to extend the period within which any suit or proceeding may be brought.

SEC. 905. JURISDICTION OF COURTS.

Concurrent with the Court of Claims, the District Courts of the United States (except as provided in section 906 of this title) shall have jurisdiction of cases to which this title applies, regardless of the amount in controversy, if such district courts would have had jurisdiction of such cases but for limitations under the Judicial Code, as amended, on jurisdiction of such courts based upon the amount in controversy. The United States Customs Court shall not have jurisdiction of any such cases.

SEC. 906. PROCEDURE ON CLAIMS FOR REFUNDS OF PROCESSING TAXES.

(a) Notwithstanding any other provision of law, no suit or proceeding, whether brought before or after the date of the enactment of this Act, shall be brought or maintained in any court for the refund of any amount paid or collected as processing tax, as defined herein, under the Agricultural Adjustment Act, except as provided in this section. The Commissioner shall allow or disallow, in whole or in part, any claim for refund of any such amount within three years after such claim was filed, unless such time has been extended by written consent of the claimant.

(b) There is hereby established in the Treasury Department a Board of Review (hereinafter referred to as "the Board"). The Board shall be composed of nine members who shall be officers or employees of the Treasury Department designated by the Secretary of the Treasury. One of such members shall be designated by the Secretary to act as chairman of the Board. The chairman may from time to time divide the Board into divisions of one or more members, assign the members of the Board thereto, and in case of a division of more than one member designate the chief thereof. A majority of the members of the Board or of any division thereof shall constitute a quorum for the transaction of the business of the Board or of the division respectively. A vacancy in the Board or in any division thereof shall not impair the powers nor affect the duties of the Board or division nor of the remaining members of the Board or division respectively. The Secretary of the Treasury shall assign to the Board such personnel in the Treasury Department as may be necessary to perform its

functions. The Board shall have jurisdiction in proceedings under this section to review the allowance or disallowance of the Commissioner of a claim for refund, and to determine the amount of refund due any claimant with respect to such claim. The Commissioner shall make refund of any such amount determined by a decision of the Board which has become final. The proceedings of the Board and its divisions shall be conducted in accordance with such rules and regulations as the Board may prescribe, with the approval of the Secretary.

(c) The allowance or disallowance of the Commissioner of a claim for refund under this section shall be final, unless within three months after the date of mailing by registered mail by the Commissioner of notice that a claim for refund of any such amount has been disallowed, in whole or in part, the claimant files a petition with the Board requesting a hearing on the merits of his claim in whole or in part. Upon the filing of any such petition, the claimant shall be entitled to a hearing as provided herein, and within three months after the date of such filing the Board shall set a date for such hearing which shall be not more than two years from the date of filing of the petition. Such hearing shall be held in Washington, District of Columbia, or in the collection district in which is located the principal place of business of the claimant, as the claimant may designate in his petition, or in any place which may be designated by the Commissioner and the claimant by stipulation in writing, and may be continued from day to day. The Board shall notify the claimant and the Commissioner of the time and place set for such hearing by registered mail.

(d) Each such hearing shall be conducted by a presiding officer who shall be a member of the Board or an officer or employee of the Treasury Department designated a presiding officer by the Secretary of the Treasury, and assigned by the Board to preside at such hearing, and shall be open to the public. The proceedings in such hearings shall be conducted in accordance with such rules of practice and procedure (other than rules of evidence) as the Board may prescribe with the approval of the Secretary of the Treasury, and in accordance with the rules of evidence applicable in courts of equity of the District of Columbia. The claimant and the Commissioner shall be entitled to be represented

by counsel, to have witnesses subpoenaed, and to examine and cross-examine witnesses. The presiding officer shall have authority to administer oaths, examine witnesses, rule on questions of procedure and the admissibility of evidence, and to require by subpoena, signed by any member of the Board, the attendance and testimony of witnesses, and the production of all necessary returns, books, papers, records, correspondence, memoranda, and other evidence, from any place in the United States at any designated place of hearing, and to require the taking of a deposition by any designated individual competent to administer oaths. Any witness summoned or whose deposition is taken pursuant to this section shall receive the same fees and mileage as witnesses in the courts of the United States.

(e) The presiding officers shall recommend findings of fact and a decision to the Board or the proper division thereof within six months after the conclusion of the hearing. Briefs with respect to such recommendations may be submitted to the Board or such division on behalf of the Commissioner and the claimant within thirty days after such recommendations have been made, unless such time is extended by the Board or such division. Except upon specific order of the chairman of the Board, no oral argument may be presented to the Board or such division after the conclusion of the hearing. The Board or a division shall make its findings of fact and decision in writing as quickly as practicable. The findings of fact and the decision of a division shall become the findings of fact and decision of the Board within thirty days after they have been made by the division, unless within such period, the chairman has directed that such findings and decision shall be reviewed by the Board. The findings and decision of a division shall not be a part of the record in any case in which the chairman directs that such findings and decision shall be reviewed by the Board. Copies of the findings of fact and decision of the Board shall be mailed to the claimant and the Commissioner by registered mail.

(f) The Board, with the approval of the Secretary of the Treasury, is authorized to draw up a table of costs and fees relating to such hearings, and the preparation of transcripts of record thereof, not to exceed with respect to any one item those charged in the Supreme Court of the United

States. Such costs and fees shall be paid by the claimant and be collected in accordance with such rules and regulations as may be prescribed by the Board, with the approval of the Secretary. If the hearing provided herein results in a modification of the allowance or disallowance of the Commissioner, such costs shall be returned to the claimant.

(g) A review of the decision of the Board, made after the hearing provided in this section, may be obtained by the claimant or Commissioner by filing a petition for review in the Circuit Court of Appeals of the United States within any circuit wherein such claimant resides, or has his principal place of business, or, if none, in the United States Court of Appeals for the District of Columbia, or any such court which may be designated by the Commissioner and the claimant by stipulation in writing, within three months after the date of the mailing to the claimant and the Commissioner of the copy of the findings and decision of the Board. A copy of such petition shall forthwith be served upon the Commissioner or upon any officer designated by him for that purpose, or upon the claimant, according to which party files such petition, and upon the Board. Thereupon the Board shall certify and file in the court, in which such petition has been filed, a transcript of the record upon which the findings and decision complained of were based. Upon the filing of such transcript such court shall have exclusive jurisdiction to affirm the decision of the Board, or to modify or reverse such decision, if it is not in accordance with law, with or without remanding the cause for a rehearing, as justice may require. No objection shall be considered by the court unless such objection shall have been urged before the Board or division and the presiding officer, or unless there were reasonable grounds for failure so to do. If the claimant or the Commissioner shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material, and that there were reasonable grounds for failure to adduce such evidence in the hearing before the presiding officer, the court may order such additional evidence to be taken before such officer, and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Board may modify its findings of fact and decision by

reason of the additional evidence so taken, and it shall file with the court such modified or new findings and decision. The judgment of the court shall be final, subject to review by the Supreme Court of the United States, upon certification or certiorari as provided in sections 239 and 240 of the Judicial Code, as amended. Such courts are authorized to adopt rules for the filing of petitions for review, the preparation of the record for review, and the conduct of the proceedings on review. If the decision of the Board is affirmed, costs shall be awarded against the claimant, and if such decision is reversed, the judgment shall provide for a refund of any costs paid by the claimant. In case of modification of such decision costs shall be awarded or refused as justice may require. The decision of the Board made after the hearing provided herein shall become final in the same manner that decisions of the Board of Tax Appeals become final under section 1005 of the Revenue Act of 1926, as amended.

SEC. 907. EVIDENCE AND PRESUMPTIONS.

(a) Where the refund claimed is for an amount paid or collected as processing tax, as defined herein, it shall be prima-facie evidence that the burden of such amount was borne by the claimant to the extent (not to exceed the amount of the tax) that the average margin per unit of the commodity processed was lower during the tax period than the average margin was during the period before and after the tax. If the average margin during the tax period was not lower, it shall be prima-facie evidence that none of the burden of such amount was borne by the claimant but that it was shifted to others.

(b) The average margin for the tax period and the average margin for the period before and after the tax shall each be determined as follows:

(1) *Tax period.*—The average margin for the tax period shall be the average of the margins for all months (or portions of months) within the tax period. The margin for each such month shall be computed as follows: From the gross sales value of all articles processed by the claimant from the commodity during such month, deduct the cost of the commodity processed during the month and deduct the processing tax paid with respect thereto. The sum so

ascertained shall be divided by the total number of units of the commodity processed during such month, and the resulting figure shall be the margin for the month.

(2) *Period before and after the tax.*—The average margin for the period before and after the tax shall be the average of the margins for all months (or portions of months) within the period before and after the tax. The margin for each such month shall be computed as follows: From the gross sales value of all articles processed by the claimant from the commodity during such month, deduct the cost of the commodity processed during the month. The sum so ascertained shall be divided by the number of units of the commodity processed during such month, and the resulting figure shall be the margin for the month.

(3) *Average margin.*—The average margin for each period shall be ascertained in the same manner as monthly margins under subdivisions (1) and (2), using total gross sales value, total cost of commodity processed, total processing tax paid, and total units of commodity processed, during such period.

(4) *Combination of commodities.*—Where, as, for example, in the case of certain types of tobacco, the articles produced and sold by the claimant are the product of several commodities combined by him during processing, the average margins shall be established with respect to such commodities as a group, and not individually, in accordance with rules and regulations prescribed by the Commissioner, with the approval of the Secretary of the Treasury.

(5) *Cost of commodity.*—The cost of commodity processed during each month shall be (a) the actual cost of the commodity processed if the accounting procedure of the claimant is based thereon, or (b) the product computed by multiplying the quantity of the commodity processed by the current prices at the time of processing for commodities of like quality and grade in the markets where the claimant customarily makes his purchases.

(6) *Gross sales value of articles.*—The gross sales value of articles shall mean (a) the total of the quantity of each article derived from the commodity processed by the claimant during each month multiplied by (b) the claimant's

sale prices current at the time of processing for articles of similar grade and quality.

(7) The quantity of each article derived from the commodity processed may be either (a) the actual quantity obtained, as shown by the records of the claimant, or (b) an estimated quantity computed by multiplying the quantity of commodity processed by appropriate conversion factors giving the quantity of articles customarily obtained from the processing of each unit of the commodity.

(c) The "tax period" shall mean the period with respect to which the claimant actually paid the processing tax to a collector of internal revenue and shall end on the date with respect to which the last payment was made. The "period before and after the tax" shall mean the twenty-four months (except that in the case of tobacco it shall be the twelve months) immediately preceding the effective date of the processing tax, and the six months, February to July, 1936, inclusive. If during any part of such period the claimant was not in business, or if his records for any part of such period are so inadequate as not to provide satisfactory data on prices paid for commodities purchased or prices received for articles sold, the average prices paid or received by representative concerns engaged in a similar business and similarly circumstanced may with the approval of the Commissioner, where necessary for a fair comparison, be substituted in making the necessary computations. If the claimant was not in business during the entire period before and after the tax, the average margin, during such period, of representative concerns engaged in a similar business and similarly circumstanced, as determined by the Commissioner, shall be used as his average margin for such period.

(d) If the claimant made any purchase or sale otherwise than through an arm's-length transaction, and at a price other than the fair market price, the Commissioner may determine the purchase or sale price to be that for which such purchases or sales were at that time made in the ordinary course of trade.

(e) Either the claimant or the Commissioner may rebut the presumption established by subsection (a) of this section by proof of the actual extent to which the claimant

shifted to others the burdens of the processing tax. Such proof may include, but shall not be limited to—

(1) Proof that the difference or lack of difference between the average margin for the tax period and the average margin for the period before and after the tax was due to changes in factors other than the tax. Such factors shall include any clearly shown change (A) in the type or grade of article or commodity, or (B) in costs of production. If the claimant asserts that the burden of the tax was borne by him and the burden of any other increased costs was shifted to others, the Commissioner shall determine, from the effective dates of the imposition or termination of the tax and the effective date of other changes in costs as compared with the date of the changes in margin (when margins are computed for weeks, months, or other intervals between July 1, 1931, and August, 1936, in the manner specified in subsection (b)), and from the general experience of the industry, whether the tax or the increase in other costs was shifted to others. If the Commissioner determines that the difference in average margin was due in part to the tax and in part to the increase in other costs, he shall apportion the change in margin between them:

(2) Proof that the claimant modified existing contracts of sale, or adopted a new form of contract of sale, to reflect the initiation, termination, or change in amount of the processing tax, or at any such time changed the sale price of the article (including the effect of a change in size, package, discount terms, or any other merchandising practice) by substantially the amount of the tax or change therein, or at any time billed the tax as a separate item to any vendee, or indicated by any writing that the sale price included the amount of the tax, or contracted to refund any part of the sale price in the event of recovery of the tax or decision of its invalidity; but the claimant may establish that such acts were caused by factors other than the processing tax, or that they do not represent his practice at other times. If the claimant processed any product in addition to the commodity with respect to the processing of which there was paid or collected an amount as tax for which he claims a refund, and if the Commissioner has reason to believe that the burden of such amount was shifted in whole or in part by means of the transactions

relating to such product, the average margin with respect to such product, and articles processed therefrom, shall also be considered, and shall be determined for the tax period applicable to the commodity and for the period before and after the tax in the manner prescribed in subsection (b) of this section. To the extent the Commissioner determines that the average margin with respect to such product was higher during the tax period than it was during the period before and after the tax, it shall be prima-facie evidence that such amount was not borne by the claimant but that it was shifted to others.

* * * * *

HOUSE OF REPRESENTATIVES

73d Congress 2d Session

Document No. 246.

AMEND THE AGRICULTURAL ADJUSTMENT ACT.

MESSAGE

from

THE PRESIDENT OF THE UNITED STATES

Transmitting

A REQUEST THAT THE AGRICULTURAL ADJUSTMENT ACT BE AMENDED TO MAKE SUGAR BEETS AND SUGARCANE BASIC AGRICULTURAL COMMODITIES.

February 8, 1934. — Referred to the Committee on Agriculture and ordered to be printed.

To the Congress:

Steadily increasing sugar production in the continental United States and in insular regions has created a price and marketing situation prejudicial to virtually everyone interested. Farmers in many areas are threatened with low prices for their beets and cane, and Cuban purchases of our goods have dwindled steadily as her shipments of sugar to this country have declined.

There is a school of thought which believes that sugar ought to be on the free list. This belief is based on the high cost of sugar to the American consuming public.

The annual gross value of the sugar crop to American beet and cane growers is approximately \$60,000,000. Those who believe in the free importation of sugar say that the 2 cents a pound tariff is levied mostly to protect this 60-million dollar crop and that it costs our consuming public every year more than 200 million dollars to afford this protection.

I do not at this time recommend placing sugar on the free list. I feel that we ought first to try out a system of quotas with the three-fold object of keeping down the price

of sugar to consumers, of providing for the retention of beet and cane farming within our continental limits, and also to provide against further expansion of this necessarily expensive industry.

Consumers have not benefitted from the disorganized state of sugar production here and in the insular regions. Both the import tariff and cost of distribution, which together account for the major portion of the consumers' price for sugar, have remained relatively constant during the past 3 years.

This situation clearly calls for remedial action. I believe that we can increase the returns to our own farmers, contribute to the economic rehabilitation of Cuba, provide adequate quotas for the Philippines, Hawaii, Puerto Rico, and the Virgin Islands, and at the same time prevent higher prices to our own consumer.

The problem is difficult but can be solved if it is met squarely and if small temporary gains are sacrificed to ultimate general advantage.

The objective may be attained most readily through amendment of existing legislation. The Agricultural Adjustment Act should be amended to make sugar beets and sugar cane basic agricultural commodities. It then will be possible to collect a processing tax on sugar, the proceeds of which will be used to compensate farmers for holding their production to the quota level. A tax of less than one-half cent per pound would provide sufficient funds.

Consumers need not and should not bear this tax. It is already within the Executive power to reduce the sugar tariff by an amount equal to the tax. In order to make certain that American consumers shall not bear an increased price due to this tax, Congress should provide that the rate of the processing tax shall in no event exceed the amount by which the tariff on sugar is reduced below the present rate of import duty.

By further amendment to the Agricultural Adjustment Act, the Secretary of Agriculture should be given authority to license refiners, importers, and handlers to buy and sell sugar from the various producing areas only in the proportion which recent marketings of such areas bear to total United States consumption. The average marketings of the past 3 years provide on the whole an equitable base, but the base period should be flexible enough to allow slight adjustments as between certain producing areas.

The use of such a base would allow approximately the following preliminary and temporary quotas:

	<i>Short tons</i>
Continental beets	1,450,000
Louisiana and Florida	260,000
Hawaii	935,000
Puerto Rico	821,000
Philippine Islands	1,037,000
Cuba	1,944,000
Virgin islands	5,000
Total	6,452,000

The application of such quotas would immediately adjust market supplies to consumption, and would provide a basis for reduction of production to the needs of the United States market.

Furthermore, in the negotiations for a new treaty between the United States and Cuba to replace the existing Commercial Convention, which negotiations are to be resumed immediately, favorable consideration will be given to an increase in the existing preferential on Cuban sugars, to an extent compatible with the joint interests of the two countries.

In addition to action made possible by such legislative and treaty changes, the Secretary of Agriculture already has authority to enter into codes and marketing agreements with manufacturers which would permit savings in manufacturing and distributing costs. If any agreements or codes are entered into, they should be in such form as to assure that producers and consumers share in the resulting savings.

FRANKLIN D. ROOSEVELT,

The White House, February 8, 1934.

Agricultural Adjustment Act, c. 641, 49 Stat. 770-771.

Sec. 30. The Agricultural Adjustment Act, as amended, is amended by adding after section 20 the following new section:

Sec. 21.

(d) (1) No recovery, recoupment, set-off, refund, or credit shall be made or allowed of, nor shall any counter claim be allowed for, any amount of any tax, penalty, or interest which accrued before, on, or after the date of the adoption of this amendment under this title (including any overpayment of such tax), unless, after a claim has been duly filed, it shall be established, in addition to all other facts required to be established, to the satisfaction of the Commissioner of Internal Revenue, and the Commissioner shall find and declare of record, after due notice by the Commissioner to such claimant and opportunity for hearing, that neither the claimant nor any person directly or indirectly under his control or having control over him, has, directly or indirectly, included such amount in the price of the article with respect to which it was imposed or of any article processed from the commodity with respect to which it was imposed, or passed on any part of such amount to the vendee or to any other person in any manner, or included any part of such amount in the charge or fee for processing, and that the price paid by the claimant or such person was not reduced by any part of such amount. In any judicial proceeding relating to such claim, a transcript of the hearing before the Commissioner shall be duly certified and filed as the record in the case and shall be so considered by the court. The provisions of this subsection shall not apply to any refund or credit authorized by subsection (a) or (c) of section 15, section 16, or section 17 of this title, or to any refund or credit to the processor of any tax paid by him with respect to the provisions of section 317 of the Tariff Act of 1930.

(2) In the event that any tax imposed by this title is finally held invalid by reason of any provision of the Constitution, or is finally held invalid by reason of the Secretary of Agriculture's exercise or failure to exercise any power conferred on him under this title, there shall be refunded or credited to any person (not a processor or other person who paid the tax) who would have been entitled to a refund or credit pursuant to the provisions of subsections (a) and (b) of section 16, had the tax terminated by proclamation pursuant to the provisions of section 13, and in lieu thereof, a sum in an amount equivalent to the amount to which such person would have been entitled had the Act

been valid and had the tax with respect to the particular commodity terminated immediately prior to the effective date of such holding of invalidity, subject, however, to the following condition: Such claimant shall establish to the satisfaction of the Commissioner, and the Commissioner shall find and declare of record, after due notice by the Commissioner to the claimant and opportunity for hearing, that the amount of the tax paid upon the processing of the commodity used in the floor stocks with respect to which the claim is made is included by the processor or other person who paid the tax in the price of such stocks (or of the material from which such stocks were made). In any judicial proceeding relating to such claim, a transcript of the hearing before the Commissioner shall be duly certified and filed as the record in the case and shall be so considered by the court. Notwithstanding any other provision of law: (1) no suit or proceeding for the recovery, recoupment, set-off, refund or credit of any tax imposed by this title, or of any penalty or interest, which is based upon the invalidity of such tax by reason of any provision of the Constitution or by reason of the Secretary of Agriculture's exercise or failure to exercise any power conferred on him under this title, shall be maintained in any court, unless prior to the expiration of six months after the date on which such tax imposed by this title has been finally held invalid a claim therefor (conforming to such regulations as the Commissioner of Internal Revenue with the approval of the Secretary of the Treasury, may prescribe) is filed by the person entitled thereto; (2) no such suit or proceeding shall be begun before the expiration of one year from the date of filing such claim unless the Commissioner renders a decision thereon within that time, nor after the expiration of five years from the date of the payment of such tax, penalty, or sum, unless suit or proceeding is begun within two years after the disallowance of the part of such claim to which such suit or proceeding relates. The Commissioner shall within 90 days after such disallowance notify the taxpayer thereof by mail.

(3) The District Courts of the United States shall have jurisdiction of cases to which this subsection applies, regardless of the amount in controversy, if such courts would have had jurisdiction of such cases but for limitations

under the Judicial Code, as amended, on jurisdiction of such courts based upon the amount in controversy.

Jones-Costigan Act, c. 263, 48 Stat. 672-674.

Sec. 4. Section 8 of the Agricultural Adjustment Act, as amended, is amended by adding at the end thereof the following new section:

Sec. 8a. (1) Having due regard to the welfare of domestic producers and to the protection of domestic consumers and to a just relation between the prices received by domestic producers and the prices paid by domestic consumers, the Secretary of Agriculture may, in order to effectuate the declared policy of this Act, from time to time, by orders or regulations—

(A) (i) Forbid processors, handlers of sugar, and others from importing sugar into continental United States for consumption, or which shall be consumed, therein, and/or from transporting to, receiving in, processing or marketing in, continental United States, and/or from processing in any area to which the provisions of this title with respect to sugar beets and sugarcane may be made applicable, for consumption in continental United States, sugar from the Virgin Islands, the Philippine Islands, the Canal Zone, American Samoa, the island of Guam, and from foreign countries, including Cuba, respectively, in excess of quotas fixed by the Secretary of Agriculture, for any calendar year, based on average quantities therefrom brought into or imported into continental United States for consumption, or which was actually consumed, therein, during such three years, respectively, in the years 1925-1933, inclusive, as the Secretary of Agriculture may, from time to time, determine to be the most representative respective three years, adjusted, together with the quotas established pursuant to paragraph (ii), (in such manner as the Secretary shall determine) to the remainder of the total estimated consumption requirements of sugar for continental United States, determined pursuant to subsection (2) of this section, after deducting therefrom the quotas for continental United States, provided for by paragraph (b) of this sub-

section: *Provided, however*, That in such quotas there may be included, in the case of the Virgin Islands, the Philippine Islands, the Canal Zone, American Samoa, and the island of Guam, direct-consumption sugar up to an amount not exceeding the respective quantities of direct-consumption sugar therefrom brought into or imported into continental United States for consumption, or which was actually consumed, therein during the year 1931, 1932, or 1933, whichever is greater, and in the case of Cuba, direct-consumption sugar up to an amount not exceeding 22 per centum of the quota established for Cuba: *And provided further*, That any imported sugar, with respect to which a drawback of duty is allowed, under the provisions of section 313 of the Tariff Act of 1930, shall not be charged against the quota established by the Secretary of Agriculture hereunder for the country from which such sugar was imported, and the Secretary of Agriculture may, by orders or regulations, readjust any quota subject to the provisions of this section, except quotas fixed by paragraph (B) of this subsection; and may allot (or appoint an officer, including the Governor General of the Philippine Islands for that area, in his name to allot) any quota, and readjust any such allotment, from time to time, among the processors, handlers of sugar and others; and/or

ii) Forbid processors, handlers of sugar, and others from transporting to, receiving in, processing or marketing in, continental United States, and/or from processing in the Territory of Hawaii or Puerto Rico for consumption in continental United States, sugar from the Territory of Hawaii or Puerto Rico, in excess of quotas fixed by the Secretary of Agriculture, for any calendar year, based on average quantities therefrom brought into continental United States for consumption, or which was actually consumed, therein during such three years, respectively, in the years 1925-1933, inclusive, as the Secretary of Agriculture may, from time to time, determine to be the most representative respective three years, adjusted, together with the quotas established pursuant to paragraph (i), (in such manner as the Secretary shall determine) to the remainder of the total estimated consumption requirements of sugar for continental United States, determined pursuant to subsection (2) of this section, after deducting therefrom the quotas for continental United States, provided for by para-

graph (B) of this subsection: *Provided, however,* That in such quotas there may be included direct-consumption sugar up to an amount not exceeding the respective quantities of direct-consumption sugar therefrom brought into continental United States for consumption, or which was actually consumed, therein during the year 1931, 1932, or 1933, whichever is greater, and the Secretary of Agriculture may, by orders or regulations, allot such quotas and readjust any such allotments, from time to time, among the processors, handlers of sugar, and others; and/or

(B) Forbid processors, handlers of sugar, and others from marketing in, or in the current of, or in competition with, or so as to burden, obstruct, or in any way affect, interstate or foreign commerce, sugar manufactured from sugar beets and/or sugarcane, produced in the continental United States beet-sugar-producing area, the States of Louisiana and Florida, and any other State or States in excess of the following quotas, for any calendar year, except as provided for in subsection (2) of this section: United States beet-sugar area, one million five hundred and fifty thousand short tons raw value; the States of Louisiana and Florida, except as may be provided under paragraph (C) of this subsection, two hundred and sixty thousand short tons raw value; and the Secretary of Agriculture may, by orders or regulations, allot such quotas and readjust any such allotment, from time to time, among the processors, handlers of sugar, and others; and/or

(C) For any calendar year, determine the quota, but not less than the quota provided in paragraph (B), for any area producing less than two hundred and fifty thousand long tons of sugar raw value during the next preceding calendar year; and/or

(D) Establish a separate quota or quotas for edible molasses and/or sirup of cane juice produced in continental United States, in addition to, and/or for edible molasses, sirups, and sugar mixtures produced in any other area or areas to which this title relates, as part of or in addition to, the quotas established pursuant to paragraphs (A) to (C), inclusive, of this subsection, for use as such and not for the extraction of sugar.

(2) (A) The consumption requirements of sugar for continental United States, for the calendar year 1934, and for each succeeding calendar year, shall be determined by the Secretary of Agriculture from available statistics of the Department of Agriculture. The consumption requirements so determined shall, at such intervals as the Secretary finds necessary to effectuate the declared policy and the purposes of this Act, be adjusted by him to meet the actual requirements of the consumer as determined by the Secretary.

(B) In the event that available statistics of the Department of Agriculture during the course of any calendar year indicate that the consumption requirements of sugar for continental United States for such calendar year will exceed the amount of the consumption requirements determined for that year, the Secretary of Agriculture may prorate such estimated excess amount on the basis of the respective quotas determined by and pursuant to subsection (1) of this section; *Provided, however*, That for each calendar year there shall be allotted to continental United States not less than 30 per centum of any amount of consumption requirements therefor above six million four hundred and fifty-two thousand short tons raw value.

(C) In the event that available statistics of the Department of Agriculture during the course of any calendar year indicate that the consumption requirements of sugar for continental United States for such year will be less than the amount of the consumption requirements determined for that year, the amount of such deficiency may be proportionately deducted from the respective quotas determined by and pursuant to paragraph (A) of subsection (1) of this section.

(D) If, during any calendar year, any producing area is unable to produce and deliver its full quota of sugar, the Secretary of Agriculture may prorate this deficiency among the other areas on the basis of their respective quotas and ability to supply the deficiency.

(E) Notwithstanding the provisions of paragraphs (A) to (C), inclusive, of subsection (1) of this section, the Secretary of Agriculture may, in order to effectuate the declared policy of this Act, from time to time, by orders or regulations, deduct from the quotas for production, im-

porting, receiving, and/or marketing, and/or from the allotments thereof, established pursuant to said paragraphs, in any given year, an amount for each year, respectively, representing the surplus stocks of sugar produced in that area, or a portion of the total surplus stocks of sugar produced in that area, in whole or in part, which may have accumulated in the year next preceding, over and above the quotas established for such year.

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HOUSE OF REPRESENTATIVES.

75th Congress 1st Session.

Document No. 156.

RECOMMENDATION REGARDING ENACTMENT OF
THE SUGAR QUOTA SYSTEM.

MESSAGE

from

THE PRESIDENT OF THE UNITED STATES.

Transmitting

A RECOMMENDATION FOR THE ENACTMENT OF
THE SUGAR QUOTA SYSTEM, AND ITS NECES-
SARY COMPLEMENTS.

March 1, 1937.—Referred to the Committee on Agriculture
and ordered to be printed.

To the Congress of the United States:

The expiration on December 31, 1937, of the quota provisions of the Jones-Costigan Act and Public Resolution No. 109 of June 19, 1936, and the existence of the public problems which have arisen as a result of discontinuance of the processing tax on sugar and benefit payments to sugar beet and sugarcane producers, make it desirable that the Congress consider the enactment of new legislation with respect to sugar. The Jones-Costigan Act has been useful and effective and it is my belief that its principles should again be made effective.

I therefore recommend to the Congress the enactment of the sugar-quota system, and its necessary complements, which will restore the operation of the principles on which the Jones-Costigan Act was based. In order to accomplish this purpose adequate safeguards would be required to protect the interests of each group concerned. As a safeguard for the protection of consumers I recommend that provision be made to prevent any possible restriction of the

supply of sugar that would result in prices to consumers in excess of those reasonably necessary, together with conditional payments to producers, to maintain the domestic industry as a whole and to make the production of sugar beets and sugarcane as profitable as the production of the principal other agricultural crops. In order to protect the expansion of markets for American exports, I recommend that no decrease be made in the share of other countries in the total quotas.

It is also highly desirable to continue the policy, which was inherent in the Jones-Costigan Act, of effectuating the principle that an industry which desires the protection afforded by a quota system, or a tariff, should be expected to guarantee that it will be a good employer. I recommend, therefore, that the prevention of child labor, and the payment of wages of not less than minimum standards, be included among the conditions for receiving a Federal payment.

I recommend that adequate provision be made to protect the right of both new and old producers of small acreages of sugar beets and sugarcane to an equitable share of the benefits offered by the program. In this connection I suggest also that you consider the advisability of providing for payments at rates for family-size farms higher than those applicable to large operating units.

Quotas influence the price of sugar through the control of supply; consequently, under a quota regulation of the supply of sugar, a tax may be levied without causing any adverse effect, over a period of time, on the price paid by consumers.

I recommend to the Congress the enactment of an excise tax at the rate of not less than 0.75 cent per pound of sugar, raw value. I am definitely advised that such a tax would not increase the average cost of sugar to consumers. An excise tax of this amount would yield approximately \$100,000,000 per annum to the Treasury of the United States, which would make the total revenue from sugar more nearly commensurate with that obtained during the period 1922-29. It is also estimated that the total income of foreign countries from the sale of sugar in the United States under the quota system would not be less than that obtained during 1935, and, like the total income of domestic sugar producers,

it can be expected to increase in future years as our consumption requirements expand.

In considering the enactment of any tax the Congress has regard for its social and economic effects as well as its ability to raise revenue. The social and economic effects of an adequate excise tax on sugar are so important to the welfare of the various groups affected as to constitute a necessary complement to the quota system. For this reason I recommend that neither the quotas nor the tax should be operative alone.

FRANKLIN D. ROOSEVELT.

The White House,

March 1, 1937.

PRESS RELEASE BY AGRICULTURAL
ADJUSTMENT ADMINISTRATION, MARCH 15, 1937.
SECRETARY WALLACE ISSUES
STATEMENT ON SUGAR

In response to requests received by the Department of Agriculture for information with respect to the sugar quota system and the proposed excise tax on sugar, the Secretary of Agriculture today issued the following statement:

• • • • •

EFFECTS OF AN EXCISE TAX ON SUGAR
UNDER A QUOTA SYSTEM

"On account of the fact that the levy of an excise tax on a commodity usually results, eventually, in an increase in the price equal to approximately the amount of the tax, one is likely to assume that excise taxes increase prices under all conditions; but an excise tax on sugar, within certain limits, under a quota system is one of the exceptions.

"The reason that an excise tax of .75 cent per pound of sugar would not increase over a period of time the price paid by consumers, under a quota system may be stated briefly; the price paid by consumers is determined of course only by the supply and demand for sugar and since neither the supply nor the demand would be changed by the proposed tax, the price paid by consumers would not be affected by the tax.

"Since in most instances the total cost of production (including duties and taxes) tends to be related to selling price, there is generally assumed to be a direct causal relation between cost and price; but in fact the cost of production affects price only indirectly through its effect on supply. If the cost of production exceed price, there is a tendency for production to decrease, and the decreased supply causes an increase in price. Thus it will be noted that the quantity of supply, and not the cost of production, is the direct causal factor in determining price; and factors other than cost of production—in this case quotas—can supersede cost of production in determining supply, and hence in determining price.

"The levy of an excise tax on foreign sugar would of course increase the cost of delivery, but under the quota system the price obtained for sugar sold by foreign producers in United States is greatly in excess of the prices they could obtain in other markets. The amount supplied the American market by such countries would not be decreased, below the total permitted under the quota system, so long as the rate of the tax levied on foreign sugars were not greater than the difference between the duty paid price of sugar in the United States and the sum of the world price of sugar and the American import duty. That differential is approximately \$1.50 per hundred pounds at the present time. Consequently, there is a substantial latitude in which duty paid and world prices of sugar could fluctuate, with a tax of 75 cents, before it would become advantageous for foreign producers to decrease the amount of sugar they supply to the American market below the amount permitted to be imported under the quotas.

"The supply of sugar from domestic sources under the quota system would not be affected by the levy of an excise tax so long as federal payments were made to the domestic sugar producers approximately equivalent to the amount of the tax. For these reasons, it appears to be reasonable to assume that the total supply of sugar made available to consumers under the quota system would not be affected by the imposition of an excise tax of 75 cents per hundred pounds. And if neither the supply nor the demand were altered by the levy of a tax, there appears to be no reason to believe that the tax recommended by the President would increase the price of sugar to consumers. Perhaps it should

be noted that although there was a tax of one-half cent per pound of sugar during 1935 and no tax during 1936 the difference in the price paid by consumers in the two years was only one-tenth cent.

"It is generally recognized that since sugar is on an import basis, the import duty, from the standpoint of consumers, is in effect an assessment on all sugar consumed in the United States, although the Government collects revenue only on the imported sugar. The portion of the assessment on consumers not collected by the Government represents the increased income to the domestic industry. Likewise, under a quota system, consumers are in effect assessed an amount equal to the extent to which domestic prices are increased above the world level of prices at which the supply would otherwise be available. Consequently, the levy of an excise tax, which would not cause an increase of the prices to consumers, would constitute merely the substitution of an excise tax for a portion of the existing, but non-revenue producing, assessment on consumers under the quota system.

"In addition to its advantages as a revenue producing measure, an excise tax on sugar is also advantageous as a means of assuring domestic producers an equitable income, of preventing child labor, of protecting the right of adult laborers to reasonable wages, and of facilitating the administration of the quota system.

"The experience in administering the former sugar program has shown that the tax of .5 cent per pound was too low a rate either to constitute an adequate source of revenue or to bring about the full social and economic advantage of such a tax."

* * * * *



No. 148

In the Supreme Court of the United States

OCTOBER TERM, 1914

WEIR STEEL COMPANY, LTD., PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

*ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES CIRCUIT COURT OF APPEALS FOR THE
FIFTH CIRCUIT*

BRIEF FOR THE RESPONDENT IN OPPOSITION



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In the Supreme Court of the United States

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BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The findings of fact and memorandum opinion of the Processing Tax Board of Review (R. 30-42) are unreported. The opinion of the Circuit Court of Appeals (R. 73-77) is reported at 140 F. 2d 768.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered February 15, 1944 (R. 78). Petition for rehearing was denied March 13, 1944 (R. 84). Petition for a writ of certiorari was filed June 12, 1944. The jurisdiction of this Court is invoked

under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether the court below erred in holding that, under Section 902 of the Revenue Act of 1936, the taxpayer failed to establish that it bore the ultimate burden of any part of the processing taxes which it paid and which it sought to recover.

2. Whether it was error not to permit the substitution of a calculation of the taxpayer's "margin" upon the processed commodity during the 1936 crop months for a calculation covering the post-tax period prescribed in the Act.

STATUTES INVOLVED

The statutes involved are set forth in the Appendix, *infra*, pp. 15-20.

STATEMENT

This proceeding was instituted in the Processing Tax Board of Review¹ upon the disallowance by the Commissioner² of Internal Revenue of the taxpayer's claim, filed under Title VII of the Revenue Act of 1936, for the refund of processing taxes in the amount of \$8,169.97, paid under provisions of the Agricultural Adjustment Act, as amended,

¹ The Processing Tax Board of Review was abolished by Section 510 of the Revenue Act of 1942, c. 619, 56 Stat. 798, as of the close of business on December 31, 1942, and its jurisdiction and functions were transferred to the Tax Court of the United States.

which were declared unconstitutional in *United States v. Butler*, 297 U. S. 1.

Section 902 of the Revenue Act provides that the taxpayer may not recover any sum unless he establishes that he has borne the ultimate economic burden of the tax to the extent of the amount awarded and has not shifted it by charging higher prices or by paying lower prices for unprocessed material or in any other manner. As a means of determining the incidence of processing taxes sought to be recovered, the Act further provides in Section 907 (Appendix, *infra*, pp. 16-20) that the extent of the reduction, if any, in the average margin of receipts over cost of raw materials plus processing taxes, enjoyed by the processor per unit of the commodity processed during the period the taxes were paid, as compared with the average margin of receipts over raw material costs during the 24 months preceding and the 6 months immediately following the period the statute was in effect, shall be "prima-facie evidence" of the extent to which the processor bore the burden of the tax; but "either the claimant or the Commissioner may rebut the presumption" so established "by proof of the actual extent to which the claimant shifted" the burden to others, including, "but * * * not * * * limited to— * * *

proof that the difference or lack of difference" between the margin averages was due to other factors and "proof" that the processor modified its contracts of sale "or adopted a new form of con-

tract of sale, to reflect the initiation * * * of the processing tax, or * * * changed the sale price of the article * * * by substantially the amount of the tax * * *, or at any time billed the tax as a separate item to any vendee, or indicated by any writing that the sale price included the amount of the tax * * *; but the claimant may establish that such acts were caused by factors other than the processing tax, or that they do not represent his practice at other times." Section 907 (e), Appendix, *infra*, pp. 19-20.

According to the findings of the Processing Tax Board of Review (R. 31-36), the taxpayer during the entire period here under consideration was engaged in the operation of a plantation, upon which it grew sugarcane; in purchasing sugarcane from others; and in processing cane into direct-consumption sugar and edible molasses. It was a processor of sugarcane within the meaning of the Agricultural Adjustment Act, as amended (R. 31).

The tax period in question began June 8, 1934, and ended November 8, 1935. During the harvest months of October, November and December, 1934, and October and November, 1935, the taxpayer engaged in processing, filed processing tax returns, and paid processing taxes aggregating \$8,168.74, plus interest of \$1.23.² (R. 34.)

² The tax and interest on sugar were \$7,067.12 and on molasses \$1,102.85 (R. 32).

Universal increases in the sale price of sugar took place on the effective date of the processing tax, June 8, 1934, in approximately the amount of the tax (R. 34). All of the accounts stated between the taxpayer and its broker, E. A. Rainold, Inc., respecting sales of molasses, included the processing tax as a separate item in addition to the sale price of the article (R. 35). A letter to the taxpayer from its broker early in 1936 stated that taxpayer did not pay any more tax upon 320,000 pounds of its sugar than was collected from its purchasers (R. 36).

All sales of sugar by the taxpayer were made through brokers in the open market, in competition with other manufacturers. Because of its inferior quality, taxpayer's sugar sold at a price which averaged 80 cents a hundred pounds less than the price of standard refined sugar. (R. 32.)

In December, 1934, the taxpayer, as a producer of sugarcane, entered into a sugarcane production adjustment contract under the Agricultural Adjustment Act, as amended, pursuant to which it received benefit payments from the United States; but neither it nor any grower from whom it purchased sugarcane received additional payments which were authorized in case returns were reduced by reason of lower prices paid by processors on account of the processing tax (R. 32-33, 41).

Upon the ground that it processed no sugar during the six months immediately following the decision which invalidated the tax (R. 34), the taxpayer sought to substitute a calculation of its average margin of profit during the fall of 1936, when it next engaged in processing a crop, for a calculation of its margin during the six months prescribed by the statute (R. 34). Both the Board (R. 39) and the court (R. 75-76) held that the statute did not authorize the use of such a calculation.

The Board found that the taxpayer's average margin for the tax period, computed as directed in the statute, was \$.01192 per pound of raw sugar processed. During the prescribed "base period" before and after, it was \$.01354. Hence the average margin was \$.00162 lower during the tax period than it was during the base period. (R. 35.) Concluding that the taxpayer had borne the burden of the tax to the extent indicated by this reduction in margin, the Board awarded a refund of \$3,655.82, arriving at this result by multiplying the difference in margins by the number of units processed (R. 35-36).

The Circuit Court of Appeals concluded (R. 77) that the findings with respect to other facts fully rebutted the presumption arising from the difference between average margins and that, since there was no other basis for the refund, the decision of the Board must be reversed.

ARGUMENT

The instant case presents no basis for the issuance of a writ of certiorari. Each case of this kind turns necessarily upon its own facts. The decision of the court below is correct on the basis of the findings of the Board, without reference to the doctrinal difference between the opinion below and the utterances of other courts, to which petitioner points. The questions presented, even if the Circuit Court of Appeals erred in some respect, lack the significance which would warrant their consideration upon the merits by this Court.

I

The presumption here involved, based upon the "prima facie" evidence of difference between average margins, was established by Congress; and in the same legislation Congress specified how the presumption might be overcome. Whether the prima facie evidence created a "mere" presumption in the sense of *Mobile, J. & K. C. R. Co. v. Turnipsed*, 219 U. S. 35, which causes the evidence upon which it is based to lose all weight the moment counter-evidence is introduced, or whether the basis for the presumption continues to have weight as evidence after the presumption has been dissolved, it is clear under the statute that certain countervailing evidence serves fully to rebut the presumption, including the evidence upon which the presumption rests. The Board made findings

based upon counter-evidence of the specified sort, which was present in the case, and there was no other evidence in support of the taxpayer's position. Therefore the court below properly reversed the decision of the Board as a matter of law.

The basis for the holding of the court below that the presumption was rebutted appears from its statement (R. 77; emphasis supplied) that "this evidence [of petitioner's policy of collecting the tax from its customers] clearly was sufficient to dissolve the presumption." No statement was made in the opinion that any countervailing evidence, of whatever sort, would have been sufficient; on the contrary, the question was stated to be (R. 76) "whether * * * the facts adduced upon the hearing and found true by the Board rebutted the presumption upon which the refund depended." The court was proceeding in accordance with the view previously stated by this Court with regard to the presumption in question: "The stated presumptions are rebuttable. If they work adversely to * * * [a taxpayer's] interests, * * * [he] will have ample opportunity to prove *all the rebutting facts*." *Anniston Mfg. Co. v. Davis*, 301 U. S. 337, 355 (italics supplied). In the *Anniston Mfg. Co.* case this Court fully sustained the processing tax provisions of the Revenue Act of 1936 upon the ground that they did not operate unfairly to the taxpayer in any respect. This is true whatever the precise nature of the

statutory presumption, in view of its rebuttable character.

It is true that the court below adhered to its ruling in *Commissioner v. Bain Peanut Co.*, 134 F. 2d 853, 860, certiorari dismissed March 6, 1944, that the presumption "is of the nature of that dealt with" in the *Tarnipseed* case, and that the Circuit Court of Appeals for the Second Circuit expressed a contrary view in *E. Regensburg & Sons v. Helvering*, 130 F. 2d 507. Actually, however, the decisions of the two courts are in harmony, since in both cases the presumption was deemed to be subject to rebuttal by means of specific evidence. In both cases the decision of the Processing Tax Board of Review was reversed because the evidence of comparative margins was given improper effect by the Board in the face of countervailing evidence.

In the *Regensburg* case the presumption arising from the difference in margins was that the taxpayer had not borne the burden of any of the tax; but there was evidence, which the Processing Tax Board of Appeals refused to consider, that the increased margin during the tax period was caused by reduced costs having no connection with the tax, and not by any increase in selling price or reduction in the purchase price of raw materials on account of the tax. The Circuit Court of Appeals held that this evidence, if findings were based upon it, might fully rebut the presump-

tion. Accordingly it remanded the case to the Board for proper findings and further action.

In the instant case the Board made findings with respect to the facts upon which the Commissioner relied, but erroneously concluded that the taxpayer was still entitled to recover the portion of the tax indicated by the presumption. The court below had no occasion to look to the evidence itself. The findings established some of the very factors which are enumerated in the statute—namely, an increase in price to the extent of the tax at the time it went into effect and separate billing of the tax—as well as a statement by its broker that the tax had been paid by purchasers, as means of rebutting the presumption. Clearly the court exercised a proper function upon judicial review by drawing the proper legal conclusion from the facts found. *Epstein v. Helvering*, 120 F. 2d 427 (C. C. A. 4th). If the court erred in any respect, moreover, the question which is raised is not one which would warrant this Court in exercising its supervisory powers by means of a writ of certiorari.

Helvering v. Insular Sugar Refining Corp., 141 F. 2d 713 (App. D. C.), also cited by the petitioner (Pet. 8), also turns upon its own facts. There, as here, the presumption arising from the margin evidence was favorable to the taxpayer with respect to a portion of the processing taxes paid, and the Board made an award which was

determined accordingly. The Board, however, did not make findings comparable to those in the instant case. On the contrary, it found with respect to sales made through brokers in the United States, which constituted 85 percent of the total, that the taxpayer did not include the processing tax in its invoices and that in only a few instances was the price shown to have included the tax. The Board considered that there was other evidence which supported the conclusion to which the margin evidence pointed. The majority of the reviewing court, with Judge Edgerton dissenting, sustained the Board on the basis of the findings made. The Government has not petitioned for certiorari because it does not deem the questions involved to call for review by this Court.

II

The Board and the court below were correct in holding that it would have conflicted with the statute to permit the petitioner to substitute a different post-tax period for the immediate six-month period prescribed in the statute, as a period during which the taxpayer's margin should be calculated for comparison with the average margin during the period the tax was paid. Section 907 (c) (Appendix, *infra*, pp. 18-19) specifies that the period after the tax shall be "the six months, February to July, 1936, inclusive." No exception is contemplated or permitted with respect to the

period to be employed. Specific provision is made, "if during any part of such period the claimant was not in business, or if his records for any part of such period are so inadequate as not to provide satisfactory data * * *," whereby "the average prices paid or received by representative concerns engaged in a similar business and similarly circumstanced may with the approval of the Commissioner, where necessary for a fair comparison, be substituted in making the necessary computations." This provision of the statute states the sole means whereby different evidence may be substituted in calculating the statutory margins for that which is employed in the normal case; and it authorizes no substitution of dates.

Neither the case of *Epstein v. Helvering*, 120 F. 2d 427, nor that of *Arkwright Mills v. Commissioner*, 127 F. 2d 465, both decided by the Circuit Court of Appeals for the Fourth Circuit, which are cited by the petitioner (Pet. 8-9), lends support to petitioner's theory. In the *Epstein* case the court held that the Processing Tax Board of Review should not have excluded from consideration certain pertinent factors, operating within the statutory six-month post-tax period, which tended to negative the presumption established by the margin evidence, which in that case was that the taxpayer had shifted the entire burden of the tax. In the *Arkwright Mills* case the court held

that the Board should have taken into account data adduced by the taxpayer for the purpose of corroborating a theory that margins in the textile industry varied proportionately to prices instead of remaining constant, even though the data included statistics with reference to prices as much as 30 months after the tax period. The evidence thus held to be relevant would not have substituted a different calculation of margins for those prescribed by the statute, but was designed to aid in the interpretation of the margin evidence.

There is a great difference between, on the one hand, supplementing by other evidence the evidence with regard to margins which the statute prescribes and, on the other hand, attempting to substitute a margin calculation covering a different period from that which the statute sets forth. There is no authority for the latter course, which lies in the face of the statutory provision. The court below decided this point correctly. *Colonial Milling Co. v. Commissioner*, 132 F. 2d 505, 508 (C. C. A. 6th), certiorari denied, 318 U. S. 780. And again, if it should be thought that the court erred, the question presented is not such as to warrant consideration by this Court upon certiorari.

CONCLUSION

There is no conflict of authorities. The decision below is correct. We respectfully submit

that the petition for a writ of certiorari should be denied.

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JULY 1944.

APPENDIX

Revenue Act of 1936, c. 690, 49 Stat. 1648:

TITLE VII—REFUNDS OF AMOUNTS COLLECTED UNDER THE AGRICULTURAL ADJUSTMENT ACT

* * * * *

SEC. 902. CONDITIONS ON ALLOWANCE OF REFUNDS.

No refund shall be made or allowed, in pursuance of court decisions or otherwise, of any amount paid by or collected from any claimant as tax under the Agricultural Adjustment Act, unless the claimant establishes to the satisfaction of the Commissioner in accordance with regulations prescribed by him, with the approval of the Secretary, or to the satisfaction of the trial court, or the Board of Review in cases provided for under section 906, as the case may be—

(a) That he ~~bore~~^{bore} the burden of such amount and has not been relieved thereof nor reimbursed therefor nor shifted such burden, directly or indirectly, (1) through inclusion of such amount by the claimant, or by any person directly or indirectly under his control, or having control over him, or subject to the same common control, in the price of any article with respect to which a tax was imposed under the provisions of such Act, or in the price of any article processed from any commodity with respect to which a tax was imposed under such Act, or in any charge or fee for services or processing; (2) through reduction of the price paid for any such commodity; or (3) in any manner whatsoever; and that no understanding or agreement, written or oral, exists whereby he may be relieved of the burden of such amount, be reimbursed

therefor, or may shift the burden thereof; or

(b) That he has repaid unconditionally such amount to his vendee (1) who bore the burden thereof, (2) who has not been relieved thereof nor reimbursed therefor, nor shifted such burden, directly or indirectly, and (3) who is not entitled to receive any reimbursement therefor from any other source, or to be relieved of such burden in any manner whatsoever. (7 U. S. C., Sec. 644.)

* * * * *

SEC. 907. EVIDENCE AND PRESUMPTIONS.

(a) Where the refund claimed is for an amount paid or collected as processing tax, as defined herein, it shall be prima-facie evidence that the burden of such amount was borne by the claimant to the extent (not to exceed the amount of the tax) that the average margin per unit of the commodity processed was lower during the tax period than the average margin was during the period before and after the tax. If the average margin during the tax period was not lower, it shall be prima-facie evidence that none of the burden of such amount was borne by the claimant but that it was shifted to others.

(b) The average margin for the tax period and the average margin for the period before and after the tax shall each be determined as follows:

(1) *Tax Period.*—The average margin for the tax period shall be the average of the margins for all months (or portions of months) within the tax period. The margin for each such month shall be computed as follows: From the gross sales value of all articles processed by the claimant from the commodity during such month, deduct the cost of the commodity processed during the month and deduct the processing tax paid

with respect thereto. The sum so ascertained shall be divided by the total number of units of the commodity processed during such month, and the resulting figure shall be the margin for the month.

(2) *Period before and after the tax.*—The average margin for the period before and after the tax shall be the average of the margins for all months (or portions of months) within the period before and after the tax. The margin for each such month shall be computed as follows: From the gross sales value of all articles processed by the claimant from the commodity during such month, deduct the cost of the commodity processed during the month. The sum so ascertained shall be divided by the number of units of the commodity processed during such month, and the resulting figure shall be the margin for the month.

(3) *Average Margin.*—The average margin for each period shall be ascertained in the same manner as monthly margins under subdivisions (1) and (2), using total gross sales value, total cost of commodity processed, total processing tax paid, and total units of commodity processed, during such period.

(4) *Combination of Commodities.*—Where, as, for example, in the case of certain types of tobacco, the articles produced and sold by the claimant are the product of several commodities combined by him during processing, the average margins shall be established with respect to such commodities as a group, and not individually, in accordance with rules and regulations prescribed by the Commissioner, with the approval of the Secretary of the Treasury.

(5) *Cost of Commodity.*—The cost of commodity processed during each month

shall be (a) the actual cost of the commodity processed if the accounting procedure of the claimant is based thereon, or (b) the product computed by multiplying the quantity of the commodity processed by the current prices at the time of processing for commodities of like quality and grade in the markets where the claimant customarily makes his purchases.

(6) *Gross Sales Value of Articles.*—The gross sales value of articles shall mean (a) the total of the quantity of each article derived from the commodity processed by the claimant during each month multiplied by (b) the claimant's sale prices current at the time of processing for articles of similar grade and quality.

(7) The quantity of each article derived from the commodity processed may be either (a) the actual quantity obtained, as shown by the records of the claimant, or (b) an estimated quantity computed by multiplying the quantity of commodity processed by appropriate conversion factors giving the quantity of articles customarily obtained from the processing of each unit of the commodity.

(c) The "tax period" shall mean the period with respect to which the claimant actually paid the processing tax to a collector of internal revenue and shall end on the date with respect to which the last payment was made. The "period before and after the tax" shall mean the twenty-four months (except that in the case of tobacco it shall be the twelve months) immediately preceding the effective date of the processing tax, and the six months, February to July, 1936, inclusive. If during any part of such period the claimant was not in business, or if his records for any part of

such period are so inadequate as not to provide satisfactory data on prices paid for commodities purchased or prices received for articles sold, the average prices paid or received by representative concerns engaged in a similar business and similarly circumstanced may with the approval of the Commissioner, where necessary for a fair comparison, be substituted in making the necessary computations. If the claimant was not in business during the entire period before and after the tax, the average margin, during such period, of representative concerns engaged in a similar business and similarly circumstanced, as determined by the Commissioner, shall be used as his average margin for such period.

(d) If the claimant made any purchase or sale otherwise than through an arm's-length transaction, and at a price other than the fair market price, the Commissioner may determine the purchase or sale price to be that for which such purchases or sales were at that time made in the ordinary course of trade.

(e) Either the claimant or the Commissioner may rebut the presumption established by subsection (a) of this section by proof of the actual extent to which the claimant shifted to others the burden of the processing tax. Such proof may include, but shall not be limited to—

(1) Proof that the difference or lack of difference between the average margin for the tax period and the average margin for the period before and after the tax was due to changes in factors other than the tax. Such factors shall include any clearly shown change (A) in the type or grade of article or commodity, or (B) in costs of production. If the claimant asserts that

the burden of the tax was borne by him and the burden of any other increased costs was shifted to others, the Commissioner shall determine, from the effective dates of the imposition or termination of the tax and the effective date of other changes in costs as compared with the date of the changes in margin (when margins are computed for weeks, months, or other intervals between July 1, 1931, and August, 1936, in the manner specified in subsection (b)), and from the general experience of the industry, whether the tax or the increase in other costs was shifted to others. If the Commissioner determines that the difference in average margin was due in part to the tax and in part to the increase in other costs, he shall apportion the change in margin between them;

(2) Proof that the claimant modified existing contracts of sale, or adopted a new form of contract of sale, to reflect the initiation, termination, or change in amount of the processing tax, or at any such time changed the sale price of the article (including the effect of a change in size, package, discount terms, or any other merchandising practice) by substantially the amount of the tax or change therein, or at any time billed the tax as a separate item to any vendee, or indicated by any writing that the sale price included the amount of the tax, or contracted to refund any part of the sale price in the event of recovery of the tax or decision of its invalidity; but the claimant may establish that such acts were caused by factors other than the processing tax, or that they do not represent his practice at other times. * * * (7 U. S. C., Sec. 649.)

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DEC 12

DEC 12

CHARLES H. HARRIS

No. 148

In the Supreme Court of the United States

OCTOBER TERM, 1944

WEBER STEEL COMPANY, LTD., PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT
COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT

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BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The findings of fact and memorandum opinion of the Processing Tax Board of Review (R. 30-42) are unreported. The opinion of the Circuit Court of Appeals (R. 73-77) is reported at 140 F. 2d 768.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered February 15, 1944. (R. 78.) Petition for rehearing was denied March 13, 1944. (R. 84.) Petition for a writ of certiorari was

filed June 12, 1944, and was granted October 9, 1944. (R. 84.) The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether the Processing Tax Board of Review created by Title VII of the Revenue Act of 1936 erred in holding that the petitioner had borne the burden of the taxes paid by it in an amount which represented the extent of tax absorption indicated by the presumption established by Section 907 of the Act.

STATUTES INVOLVED

The pertinent statutes are set forth in Appendix A, *infra*.

STATEMENT

This proceeding was instituted in the Processing Tax Board of Review¹ upon the disallowance by the Commissioner of Internal Revenue of the petitioner's claim filed under Title VII of the Revenue Act of 1936, for the refund of processing taxes in the amount of \$8,169.97, paid under provisions of the Agricultural Adjustment Act, as amended, which was declared unconstitutional in *United States v. Butler*, 297 U. S. 1.

¹The Processing Tax Board of Review was abolished by Section 510 of the Revenue Act of 1942, c. 619, 56 Stat. 798, as of the close of business on December 31, 1942, and its jurisdiction and functions were transferred to the Tax Court of the United States.

According to the findings of the Processing Tax Board of Review (R. 31-36), during the entire period here under consideration the petitioner was engaged in the operation of a sugarcane plantation, in purchasing sugarcane from others, and in processing cane into direct-consumption sugar and edible molasses. It was a processor of sugarcane within the meaning of the Agricultural Adjustment Act, as amended. (R. 31.)

The tax period in question began June 8, 1934, and ended November 8, 1935. During the harvest months of October, November and December, 1934, and October and November, 1935, the petitioner engaged in processing, filed processing tax returns, and paid processing taxes aggregating \$8,168.74 plus interest of \$1.23.² (R. 34.)

Universal increases in the sale price of sugar took place on the effective date of the processing tax, June 8, 1934, in approximately the amount of the tax. (R. 34.) All of the accounts stated between the petitioner and its broker, E. A. Rainold, Inc., respecting sales of molasses, included the processing tax as a separate item in addition to the sale price of the article; a typical account sale of petitioner's sugar through this broker also carried the tax as an "extra". (R. 35.) And a letter to the petitioner from the broker early in 1936 stated that the petitioner did not pay more

² The tax and interest on sugar amounted to \$7,067.12 and on molasses to \$1,102.85. (R. 32.)

tax upon 320,000 pounds of its sugar than was collected from buyers. (R. 36.) All sales were made in the open market, in competition with other sellers. (R. 32.) There was no agreement directly between petitioner and purchasers of its product relative to shifting the tax. (R. 36.)

The Board found that the petitioner's average margin for the tax period, computed as directed in Section 907 of Title VII, was \$.01192 per pound of raw sugar processed. During the statutory "base period" before and after the tax, the average margin was \$.01354. Hence the average margin was \$.00162 lower during the tax period than during the base period. (R. 35.) Concluding that under Section 907 of the Act, the petitioner had borne the tax to the "presumed" extent indicated by this reduction in margin, the Board awarded a refund of \$3,655.82, arriving at this result by multiplying the difference in margins by the number of units processed. (R. 35, 36.)

The Circuit Court of Appeals concluded (R. 77) that the findings with respect to other facts fully rebutted the presumption arising from the difference between average margins and that, since there was no other proof to support any refund, the decision of the Board must be reversed.

³ The opinion (R. 77) and the judgment (R. 78) of the Circuit Court of Appeals both state that "the decision is reversed and the cause remanded to the Tax Court for further proceedings not inconsistent with" the Court's opinion. The order of remand, however, expressly states (R. 77) that

SUMMARY OF ARGUMENT

Title VII of the Revenue Act of 1936 provided for the refund of processing taxes paid pursuant to the invalidated Agricultural Adjustment Act. Recovery was expressly conditioned upon proof that the claimant bore the ultimate economic brunt of the tax. However, as an aid to establishing whether the tax burden had been assumed or whether the claimant had shifted it to others, Congress created a "two-way" presumption based on a comparison of the claimant's margin, as defined, during the tax period, with his margin during a prescribed base period. If the margin remained constant or if it was greater in the tax period than in the base period, the tax was presumed to have been shifted; if the margin was less, the tax was presumed to have been absorbed to the extent of the reduction. Provision was made for either party to rebut the presumption by proof of the "actual extent" to which the claimant passed on to others the burden of the tax, and examples of pertinent rebuttal evidence were set forth. These examples, however, were expressly made non-exclusive of other proof.

"the claim [of the petitioner] should have been disallowed in its entirety" and no instruction is given to the Tax Court as to what further proceedings it shall take upon the remand. We shall assume in this brief that the court below intended that the Tax Court should deny the claim without further hearing or consideration.

In the case at bar, the margin comparisons indicated that the petitioner had to some extent assumed the tax burden. But the Commissioner, following exactly the suggestions for rebuttal proof made in the statute, produced evidence which clearly showed that the claimant had in fact shifted the entire burden of the tax to its customers. Nevertheless, the Board of Review gave judgment for the petitioner based upon the presumptive absorption shown by the margin calculation; its decision was reversed by the court below and the claim denied, on the ground that the presumption disappeared from the case upon the introduction of the Commissioner's evidence, leaving nothing upon which to found a judgment favorable to the petitioner. We submit that this was the correct disposition of the case.

Under the statute, the petitioner had the burden throughout the Board proceedings of proving that it bore the ultimate brunt of the tax. That burden was not affected by the presumption of partial absorption arising from the margin comparisons. Congress expressly made the presumption rebuttable, and it is never the function of a disputable presumption to shift the burden of proof. It is neither evidence nor to be treated as such. This kind of presumption serves merely to require that upon proof of a given basic fact, the trier of fact shall infer the existence of the presumed fact unless and until the opposing party produces sufficient

evidence to justify a finding that the presumed fact does not exist. When such evidence has been introduced, the presumption is eliminated from the case, and the existence or non-existence of the presumed fact is to be determined exactly as if no presumption had ever been operative in the action. These principles have long been the view of this Court.

It is true that the statute here provides that the presumption may be rebutted by proof of the "actual extent" to which the tax was passed on. But further provisions of the statute definitely demonstrate that Congress did not intend by those words to import any different requirement with respect to the kind or degree of proof necessary to rebut the presumption from that which governs the refutation of disputable presumptions under well understood principles of evidence. This Court early said that the "actual" extent of shift was specified merely in contradistinction to the "presumed" extent of shift.

We grant that, although there is no conflict of decisions, the Circuit Court of Appeals for the Second Circuit entertains a different view of the effect of the statutory presumption from that held by the court below. But we think that in casting upon the claimant as a result of the presumption a burden greater than the burden of proof in the case, the court there neglected to consider that this is a presumption which

may operate against either party; that there is no warrant in the statute for applying it in one manner as to the taxpayer and in another as to the Government; and that if the court's rationale were applied to the presumption when it was unfavorable to the Government, the burden upon the Government would be greater than if it had the affirmative of the issue, even though the Government has no case to prove.

With the presumption out of the case, we submit that there was no rational basis in the evidence here for any conclusion other than that the petitioner had shifted the tax. We agree that the margin evidence upon which the presumption was based remained in the case. But we contend that the probative value of the margin evidence to establish tax absorption was negligible—certainly it was grossly insufficient in the face of the evidence introduced by the Commissioner to carry the petitioner's affirmative burden of establishing that it had not in fact shifted the tax. And the petitioner produced no other competent evidence in support of its claim.

There is no merit to the petitioner's contention that it was entitled to a refund of the total tax paid on the basis of a comparison of its margin for the tax period with its margin for a base period other than that which the statute prescribes, on the ground that a portion of the

statutory base period is inapplicable because the petitioner sold none of its product during that portion and that the remainder of the period is inappropriate because of factors rendering it an inequitable period for comparison. The language used by Congress in establishing the comparison formula prescribes what the base period shall be. There is no warrant for the substitution of any other period.

Should the Court be of the view that the comparative margin evidence has greater probative value than is contended above and that the court below should not have directed the Tax Court to dismiss the claim, we submit that the proceeding should be remanded to that Court with directions to reconsider the evidence and reach a conclusion freed of the error resulting from the Processing Tax Board's attachment of weight to the statutory presumption after counter-evidence had been introduced.

ARGUMENT

THE BOARD OF REVIEW ERRED IN HOLDING THAT THE PETITIONER BORE THE BURDEN OF THE PROCESSING TAX IN ANY AMOUNT

Section 902 of the Revenue Act of 1936 (Appendix A, *infra*) requires a claimant for the refund of processing taxes paid under the Agricultural Adjustment Act to establish that he bore the ultimate burden of the tax. The section is both specific and all inclusive in this respect; re-

covery is expressly conditioned on proof by the taxpayer:

(a) That he bore the burden of such amount and has not been relieved thereof nor reimbursed therefor nor shifted such burden, directly or indirectly, (1) through inclusion of such amount by the claimant, * * *, in the price of any article with respect to which a tax was imposed under the provisions of such Act, or in the price of any article processed from any commodity with respect to which a tax was imposed under such Act, or in any charge or fee for services or processing; (2) through reduction of the price paid for any such commodity; or (3) in any manner whatsoever; and that no understanding or agreement, written or oral, exists whereby he may be relieved of the burden of such amount, be reimbursed therefor, or may shift the burden thereof; * * *

The intent of Congress is clear from the Report of the Senate Committee on Finance on the Revenue Act of 1936 (S. Rep. No. 2156, Appendix B, *infra*) which states (p. 33):

Title VII adheres to the fundamental principle of equity applicable in respect to claims for refund, namely, that the claimant secure a refund only with respect to the amount of tax of which he bore the economic burden.

The Committee recognized, however, that "the question as to whether processing taxes were

passed on * * * involves extremely complicated economic and accounting considerations". And since at the time the processing tax was levied no reason existed for believing that the recording of the pertinent information would be of future benefit, it was manifest to the Congress that in many instances considerable difficulty would be encountered in proving directly either that the tax was borne or that it was shifted.

Accordingly, Section 907 (a) of the Act (Appendix A, *infra*) provides that the claimant may establish a "*prima facie*" case for absorption by showing the extent by which his average margin between gross sales prices of the commodity and its cost plus the taxes paid, was less during the tax period than the average margin between sales price and cost in the two years preceding payment of the taxes and the six months succeeding invalidation of the tax by this Court in January of 1936. If the average margin during the tax period was equal to, or greater than, the margin in the period before and after the tax, the statute makes that fact "*prima facie* evidence" that none of the burden was borne by the claimant. Subsection (c) of Section 907 (Appendix A, *infra*) declares, however, that either the claimant or the Commissioner may rebut the "presumption" established by the margin comparisons by proof of the "actual extent to which the claimant shifted to others the burden of the processing tax".

In the case at bar, the Board of Review found (R. 35) that the average margin per unit of the sugar processed was \$.00162 lower in the tax period than in the base period. Under subsection (a) of Section 907, therefore, the petitioner established a *prima facie* case that it had absorbed the tax to the extent of the reduction in margin. Pursuant to subsection (c) of Section 907, however, the Commissioner then introduced substantial evidence, hereinafter considered in detail, to show that the petitioner had in fact shifted the burden of the tax to others; that evidence stood uncontradicted and was specifically accepted in the fact findings as true. (R. 34-36.) Nevertheless, the Board decided on the basis of the presumption that the petitioner was entitled to a refund to the extent that the margin computations showed a reduced margin in the tax period. The Circuit Court of Appeals, following the analysis which it made of the presumption in the case of *Commissioner v. Bain Peanut Co.*, 134 F. 2d 853, reversed the decision, holding (R. 77) that the claim should have been disallowed in its entirety. The Government maintains that this was the correct disposition of the case.

2. THE PRESUMPTION OF PARTIAL ABSORPTION BASED UPON THE MARGINAL COMPARISONS DISAPPEARED FROM THE CASE UPON INTRODUCTION OF THE COMMISSIONER'S REBUTTING EVIDENCE.

In any action for refund of taxes the claimant has the general burden of proving that the Government withholds money which in equity should

be returned. *Helvering v. Taylor*, 293 U. S. 507. And as previously noted, under Section 902 of the Act with which we now deal, a claimant for the refund of processing taxes has the specific burden of proving, as an express condition to recovery, that he bore the ultimate economic brunt of the tax. *Anniston Mfg. Co. v. Davis*, 301 U. S. 337. Cf. *United States v. Jefferson Electric Co.*, 291 U. S. 386. The petitioner at bar was therefore possessed of a particularly onerous burden of proof, and that burden remained with it from the outset of the Board proceedings to their close. For the burden of proof, being a matter of substantive law, rests always with the party upon whom it was originally placed; it never shifts with the evidence. *Commercial Corp. v. N. Y. Barge Corp.*, 314 U. S. 104; *Hill v. Smith*, 260 U. S. 592; *New Orleans & N. E. R. R. Co. v. Harris*, 247 U. S. 367; *Central Vermont Ry. v. White*, 238 U. S. 507.

The presumption created by Congress in Section 907 of Title VII did not declare any rule of substantive law.¹ Being expressly made rebut-

¹Cf. Section 115 (b) of the Internal Revenue Code which declares that every distribution to stockholders is a dividend to the extent of earnings available. This is a so-called "conclusive" presumption; it *does* state a rule of substantive law. See *Edwards v. Douglas*, 269 U. S. 201; *Christopher v. Barnett*, 55 F. 2d 527 (App. D. C.); *Leland v. Commissioner*, 59 F. 2d 523 (C. C. A. 1st); *McCaughy v. McCahan*, 39 F. 2d 3 (C. C. A. 3d).

And cf. *Heiner v. Donnan*, 285 U. S. 312, dealing also with a "conclusive" presumption.

table, it merely stated a rule of evidence not designed in any way to affect the burden of proof resting on the processing tax claimant under Section 902 of the Act. It is never the function of a disputable presumption to shift the burden of persuasion; such a presumption serves merely to require that on proof of a certain basic fact the trier of fact shall infer the existence of the presumed fact unless the opposing party produces sufficient evidence to render the non-existence of the presumed fact as probable as its existence. When once such evidence has been introduced the presumption disappears, and the existence or non-existence of the presumed fact is to be determined exactly as if no presumption had ever been operative in the action. *Commercial Corp. v. N. Y. Barge Corp.*, 314 U. S. 104, 110; *N. Y. Life Ins. Co. v. Gamer*, 303 U. S. 161, 170-172; *Del Vecchio v. Bowers*, 296 U. S. 280; *Western & Atl. R. Co. v. Henderson*, 279 U. S. 639; *Hill v. Smith*, 260 U. S. 592; *New Orleans & N. E. R. R. Co. v. Harris*, 247 U. S. 367; *Mobile, J. & K. C. R. R. Co. v. Turnipseed*, 219 U. S. 35; IX Wigmore, Evidence (3d ed.), Secs. 2489, 2491; American Law Institute, Model Code of Evidence, 306-318.

The rules governing disputable presumptions are fully discussed by this Court in *Commercial Corp. v. N. Y. Barge Corp.*, *supra*, which involved the presumption that where goods are lost in the possession of a bailee, he is at fault. In that case

the evidence by both parties left the cause of the loss in doubt. Holding that in such circumstances the bailor could not recover, the Court said (pp. 110-111):

The burden of proof in a litigation, wherever the law has placed it, does not shift with the evidence, and in determining whether petitioner has sustained the burden the question often is, as in this case, what inferences of fact he may summon to his aid. * * * Since the bailee in general is in a better position than the bailor to know the cause of the loss and to show that it was not one involving the bailee's liability, the law lays on him the duty to come forward with the information available to him. * * * If the bailee fails it leaves the trier of fact free to draw an inference unfavorable to him upon the bailor's establishing the unexplained failure to deliver the goods safely. * * *

Whether we label this permissible inference with the equivocal term "presumption" or consider merely that it is a rational inference from the facts proven, it does no more than require the bailee, if he would avoid the inference, to go forward with evidence sufficient to persuade that the non-existence of the fact, which would otherwise be inferred, is as probable as its existence. It does not cause the burden of proof to shift, and if the bailee does go forward with evidence enough to raise doubts as to the validity of the inference, which

the trier of fact is unable to resolve, the bailor does not sustain the burden of persuasion which upon the whole evidence remains upon him, where it rested at the start.

In *Del Vecchio v. Bowers*, 296 U. S. 280, *supra*, this Court dealt with the Longshoremen's & Harbor Workers' Compensation Act, Section 20 of which provides that in any proceeding to enforce a claim for compensation under the Act, "it shall be presumed, in the absence of substantial evidence to the contrary— * * * (d) That the injury was not occasioned by the willful intention of the injured employee to injure or kill himself * * *". The Court there said (p. 286):

Once the employer has carried his burden by offering testimony sufficient to justify a finding of suicide, the presumption falls out of the case. It never had and cannot acquire the tribute of evidence in the claimant's favor. Its only office is to control the result where there is an entire lack of competent evidence.

There is no reason to infer that Congress intended by Section 907 to erect a presumption having any different character from that consonant with these principles. It is true that Section 907 (e) states that either party may rebut the presumption by proof of the "actual extent" to which the claimant passed on the tax. This does not mean however that refutation must demon-

strate with mathematical exactitude the extent to which the tax burden was shifted; the petitioner itself negatives (Br. 21-22) any such literal intendment. And we submit that the further provisions of Section 907 (e) distinctly show that Congress did not intend the words "actual extent" to import any different requirement whatever with respect to the kind or degree of proof necessary to rebut the presumption from that which governs the overthrow of rebuttable presumptions under the well-understood rules of evidence above discussed. Immediately following the declaration in Section 907 (e) that the presumption may be rebutted by proof of the "actual extent" to which the claimant shifted the burden, Congress set forth various kinds of evidence which it deemed pertinent to rebut the presumption. But Congress was careful to precede the list with the express statement that "Such proof may include, but shall not be limited to" the examples of evidence stated in the statute. So obvious an effort to avoid the rule *expressio unius est exclusio alterius* serves plainly to show, we think, that Congress had in mind merely to create an ordinary disputable presumption which would be dispelled by any competent evidence, either direct or circumstantial, sufficient to raise doubts as to the validity of the inference arising preliminarily from the margin comparisons.

This view was taken in *Anniston Mfg. Co. v. Davis*, 301 U. S. 337. There the taxpayer, in an early attack upon the constitutionality of Title VII, contended *inter alia* that to require proof of the "actual extent" of tax shift might operate as a denial of the claimant's constitutional rights, because such a requirement was inherently impossible of fulfillment. This Court declared however (p. 355) that the "words *actual extent*" in subsection (c) of Section 907 "are used in contradistinction to the *presumed extent*". In other words, "actual" means "in actuality" rather than "precise" or "unquestionable", and the use of the term does not signify that the presumption may be overcome only by the strongest and most accurate proof. Elsewhere in the section—in the use of the term "*prima facie* evidence", in the care with which Congress provided a wide-open door to the presentation of all varieties of evidence appropriate to rebut the presumption—the petitioner's contention that the words "actual extent" are words of limitation, which constitutes the premise of its whole case, is negated.

It is true that in the case of *E. Regensburg & Sons v. Helvering*, 130 F. 2d 507, the Circuit Court of Appeals for the Second Circuit attributed to the statutory presumption a greater force and effect than we here contend that it has. However, the actual decision in that case presents no conflict with the decision in this one. Both courts

reversed the Board for basing its determination upon the statutory presumption without evaluating the disfavored party's rebuttal evidence. Furthermore, since it was the taxpayer against whom the presumption operated in the *Regensburg* case, the court was not called upon there to consider the effect of the presumption when, as here, it is the Commissioner whose evidence in rebuttal is under appraisal; hence the case is not contrary authority in point. Nevertheless, the court in the *Regensburg* case used such terms as to leave little doubt that its views as to the character of the presumption are not in accord with those which are held by the court below.⁵

⁵ Nor do they agree with the views of the Circuit Court of Appeals for the Sixth Circuit. In *Cornett-Lewis Coal Co. v. Commissioner*, 141 F. 2d 1000, the court was concerned with Title III of the Revenue Act of 1936, the unjust enrichment tax law, which is a companion statute to the one with which we here deal. Title III also created a "two-way" presumption with respect to tax incidence, based on margin computations, and provided for its rebuttal "by proof of the actual extent to which the taxpayer shifted to others the burden of the * * * tax." Revenue Act of 1936, Section 501. The Sixth Circuit in the *Cornett-Lewis* case criticized (p. 1005) the view of the presumption adopted in the *Regensburg* opinion and followed instead the view which is taken here. See also *Clinchmore Coal Mining Co. v. Commissioner*, 143 F. 2d 112 (C. C. A. 6th); *Harlan Collieries Co. v. Commissioner*, 142 F. 2d 453 (C. C. A. 6th).

And compare, as in substantial harmony with the Fifth Circuit's analysis of the Section 907 presumption, the dissenting opinion of Edgerton J., in *Helvering v. Insular Sugar Refining Corp.*, 141 F. 2d 713, 717 (App. D. C.).

The court reasoned in the *Regensburg* case (p. 508) that Section 907 neither imposed the burden of proof upon the claimant nor established merely an ordinary presumption against him when the prima facie margin evidence was adverse to his claim, since he already had the burden of proof, to which an adverse presumption would add nothing. Therefore (pp. 508-509),

the section could not have used presumption in the strict sense, but that it meant that when the spread between "margins" is against the claimant, even though he may in general have otherwise satisfied the conditions of § 902 * * *, he must show that the spread was not owing to his shifting the tax.

In other words, the taxpayer's rebuttal burden under Section 907 was regarded as greater, or at least as more specific in character, than the burden under Section 902 of proving his case. This is, of course, directly contrary to the usual interplay between rebuttable presumption and burden of proof.

The court ignored the fact that Section 907 creates a presumption which may operate either in favor of the taxpayer or of the Government and is, therefore, a "two way" presumption. It is not true, moreover, that no presumption is ever recognized as against one who has the burden of proof, for there are many instances in which a presumption operates against

the party who has the affirmative of the issue. For example, in a jurisdiction which places the burden on the defendant to prove contributory negligence, he may be faced also with the presumption that the deceased, the fault for whose death is at issue, was exercising due care at the time of the accident. The case of *First Trust & Deposit Co. v. Shaughnessy*, 134 F. 2d 940 (C. C. A. 2d) dealt with a presumption under the estate tax law⁶ that certain transfers of property when made within two years of death, "shall, unless shown to the contrary, be deemed to have been made in contemplation of death." Like the *Regensburg* case, the *First Trust* case was an action for refund—hence the taxpayer already had the burden of proof on the issue of whether death was contemplated. The court was not disturbed, however, by the lack of logic in a presumption added to the burden of proof upon the claimant. The executors failed in the *First Trust* case not by reason of any extraordinary force in the presumption, but by reason of having the burden of proof. The trial court's view that the presumption continued operative after the executors had gone forward with rebuttal evidence⁷ was rejected, although the statute provided that the presumed fact was to be accepted unless "shown to

⁶ Internal Revenue Code, Section 811 (c).

⁷ Cf. *Mather v. MacLaughlin*, 57 F. 2d 223 (E. D. Pa.); *Myers v. Magruder*, 15 F. Supp. 488 (D. Md.); *Liebmann v. Hassett*, 50 F. Supp. 537 (D. Mass.).

the contrary".⁸ Speaking through Judge Learned Hand, the court characterized the situation created by the coincidence of presumption and burden as follows (p. 941):

To make good * * * [their] claim they [the executors] must not only bring forward some evidence that Ballard did not make the gift in contemplation of death, but they must carry the burden of proof on that issue: a duty which comprises more than the duty imposed by the presumption.

The same reasoning is entirely applicable to a processing tax case in which the margin presumption operates adversely to the claimant. It follows that since the presumption here operates in the same manner as to either party, the Government's duty under Section 907 is not greater than when the presumption favors the taxpayer. It must cast doubt on the validity of the inference, but manifestly need not carry the burden of proof under Section 902, which "comprises more than the duty imposed by ^{the} presumption." Conversely the claimant may overcome a pre-

⁸ Cf. *Del Vecchio v. Bowers*, 296 U. S. 280, *supra*, where the statutory presumption was to govern "in the absence of substantial evidence to the contrary." This Court, treating the presumption as dissipated by evidence sufficient to justify a finding that the presumed fact did not exist, said in effect (p. 286) that the requirement that evidence to overcome the presumption must be substantial added nothing to the general evidentiary principles governing the refutation of disputable presumptions.

sumption adverse to him by introducing evidence inconsistent with it, even though it falls short of proving his case. See *Anniston Mfg. Co. v. Davis*, *supra*. However, in order to prove his case where, for example, the margin computations show that the tax was entirely shifted, it may be necessary on occasion for the taxpayer to account specifically for the unfavorable spread.

If it were true that the comparative-margin presumption went beyond the burden of proof in some respect, the anomalous consequence would be, in a case in which the presumption favored the taxpayer, that the Government, which had no case to prove, would nevertheless be under a greater burden than the moving party in the action. No reason exists for supposing that Congress intended thus to reverse the usual situation in refund actions. It sought, rather, to supply a substitute for proof where proof was not available and to provide a point of departure for consideration of the evidence if additional proof was forthcoming; and we submit that this is all that it did.

The evidence which the Commissioner produced in rebuttal of the margin computations in the instant case must be judged in the light of Section 907 (e) (2) of the Act, which sets forth various types of proof to rebut a presumption favorable to the claimant, based upon the margin evidence. As "proof that the claimant * * * changed

the sale price of the article . . . by substantially the amount of the tax", the Commissioner produced evidence which the Board accepted as true (R. 34), that universal increases in the sale price of sugar were made by the industry on the effective date of the processing tax in precisely the amount of the levy. The petitioner continues to emphasize (Br. 37-39) that it did not increase its price on the imposition date because it was not processing sugar at that time and did not begin to process or sell until four and one-half months later. The Board concluded that petitioner joined in the general price increase when it re-entered the market, stating (R. 41) that the reasonable inference to be drawn was that the petitioner, operating competitively (R. 32), did join in the increase and "at least, for a time, was able to, and in fact did, shift the burden of the processing tax to the consumer."*

The Commissioner also adduced evidence, which was accepted as true by the Board (R. 35), that all sales of molasses made through the petitioner's

* It is urged (Br. 39-41), that the universal price increase in the sugar industry was not "tax covering" but was due to a factor other than the tax, i. e., the quota system of control which became effective by statute coincidentally with the imposition of the processing tax. The petitioner claims (Br. 40) that the price movement was controlled by the quota and that that factor "dominated all other factors." However, if the quota and not the tax was responsible for the price rise, it is remarkable that the amount of the increase tallied exactly with the amount of the tax. The inference to be drawn from the fact of the increase was, in any event, a matter for the Board.

broker, E. A. Rainold, Inc., included the processing tax as a separate item and as an addition to the sales price.¹⁰ The Commissioner also offered an account stated on the sale of petitioner's sugar, which the Board found to be typical of all accounts respecting sugar sales made through E. A. Rainold, Inc., and which bore the following notation (R. 35):

Golden Ridge	100 Pkts.	10,000#	@ 3.71c	\$371.00
	F. O. B. Pltn.	Tax Pd.		
	Tax	0.526c ¹¹		

A letter to the petitioner from its broker, dated shortly after the processing tax was declared unconstitutional and introduced in evidence by the Commissioner, showed (R. 35-36) that the broker had collected on behalf of petitioner the processing tax on 320,000 pounds of sugar, which more than reimbursed petitioner for all the processing taxes paid by it on sugar processed from the 1935 crop (R. 13). The letter related only to the 1935 processing, but presumably the 1934 processing was handled in the same way, since it was preceded by the price increase and the product was sold with the tax billed as shown above.

Thus in the manner expressly contemplated in the statute, the presumption was attacked and the reliability of the margin computation as evidence

¹⁰ All sales of the petitioner's products after the early part of 1932 were made through brokers in the open market in competition with other manufacturers. (R. 32.)

¹¹ The figure 0.526 was the prevailing rate of the processing tax at or about the time of rendition of this account. (R. 35.)

of tax absorption was impugned. The Commissioner's evidence was ample to "raise doubts as to the validity of the inference"¹² of absorption, or to "justify a finding"¹³ of shift. It was, indeed, far more compelling. It plainly showed a general practice on the part of petitioner to pass on the processing tax throughout the period in which it was subject to the levy.¹⁴ We submit that the presumption of partial absorption arising here from the margin comparisons was fully rebutted;¹⁵ it was therefore at that stage of the proceedings completely eliminated from the case.

B. THE PROCESSING TAX BOARD ERRED AS A MATTER OF LAW IN RENDERING A DECISION WHICH (1) GIVES CONTINUED EFFECT TO THE PRESUMPTION AND (2) DOES NOT REST UPON SUBSTANTIAL EVIDENCE. THE COURT BELOW PROPERLY DIRECTED THAT PETITIONER'S CLAIM BE DISALLOWED.

Contrary to the view just advanced, the Processing Tax Board of Review continued to treat

¹² *Commercial Corp. v. N. Y. Barge Corp.*, 314 U. S. 104, *supra*.

¹³ *Del Vecchio v. Rogers*, 296 U. S. 280, *supra*.

¹⁴ If petitioner's acts, disclosed by the Commissioner's rebuttal evidence, did not "represent his practice at other times" it was his right under Section 907 (e) to come forward with evidence to that effect. He offered no such evidence.

¹⁵ Cf. *United States v. H. T. Poindexter & Sons Mer. Co.*, 128 F. 2d 992, 995 (C. C. A. 8th). There the court regarded the fact that the processor, immediately after the imposition of the tax, increased prices in the amount of the tax as a "concrete definitely controlling consideration" and concluded that from this showing alone the taxpayer had "manifestly shifted the burden to the customers."

the comparative-margin presumption as operative and ultimately based its decision of partial award thereon. The case is not one in which the Board, applying the correct rules of law with respect to the character and effect of the statutory presumption, weighed the evidence in rebuttal and found it inadequate to overcome the presumption. Even if it were, we believe that, in view of the weight of the Commissioner's evidence, such a conclusion could not have been sustained.¹⁶ But the Board continued the presumption to the end of the case; its ultimate finding (R. 36) that the petitioner had not shifted the tax to the extent of the \$3,655.82 awarded was simply an application of the margin computation.¹⁷ We think it is clear that the Board gave artificial weight to the presumption and thus committed an error of law. For while it is true that whether the claimant bore the economic burden of the tax is an issue ultimately factual in character (*Helvering v. Insular Sugar Refining Corp.*, 141 F. 2d 713 (App. D. C.)), the play of the presumption in the case is a legal question (*Commissioner v. Bain Peanut Co.*, 134 F. 2d 853 (C. C. A. 5th); *E. Reg-*

¹⁶ See Edgerton, J., dissenting in *Helvering v. Insular Sugar Refining Corp.*, 141 F. 2d 713, 719.

¹⁷ The opinion of the court below states (R. 74):

The refund entered by the Board was awarded upon the theory that the claimant had established facts sufficient to invoke the statutory presumption that it had borne the burden of the tax to the extent of \$3,655.82.

ensburg & Sons v. Helvering, 130 F. 2d 507 (C. C. A. 2d)). And a determination by the trier of fact that the claimant did or did not bear the burden of the tax, brought about by an erroneous concept of the legal effect of the presumption, is not a sustainable decision. For that reason, the Board's decision was not sustainable in the instant case, under principles stated in *Dobson v. Commissioner*, 320 U. S. 489, rehearing denied, 321 U. S. 231.

A more serious error was committed, we believe, in *Helvering v. Insular Sugar Refining Corp.*, 141 F. 2d 713 (App. D. C.), in which the majority of the court, as one ground for affirmance, accorded finality to a similar determination by the Board, thus ignoring the fact that the issue before it, though ultimately factual, involved a "clear cut" question of law. Implicit in the court's view, if not clearly expressed in its opinion, was the concept that the presumption was "evidence" to which such weight attached as virtually to shift the burden of proof upon the Commissioner. The error of this concept and the error in result are so well stated in Justice Edgerton's dissenting opinion as to warrant quotation here *in extenso*. He said (p. 719):

The opinion of the court, like that of the Board, rests on the premise that since the "prima-facie evidence" or "presumption" was favorable to claimant, claimant was not required to prove that it bore the burden

of the tax but the Commissioner was required to prove the contrary; in other words, when claimant established its prima facie case the burden of proof shifted from the claimant to the Commissioner. This premise seems to me erroneous. I cannot reconcile it either with the settled meanings of the terms "prima facie evidence" and "presumption" or with the basic enactment in the second section of the statute that "No refund shall be made or allowed * * * unless the claimant establishes * * * that he bore the burden of such amount and has not been relieved thereof nor reimbursed therefor nor shifted such burden * * *." The rebuttal section, 907 (e), on which the court appears to rely, does not purport to limit that enactment. It purports, on the contrary, to limit the effect of the presumption. It is a legislative recognition of the fact that the particular types of evidence which it enumerates are, and others may be, "appropriate to overcome" the presumption. I think the spirit and purpose as well as the letter of the Act are violated by holding, as the court does, that a claimant who (1) immediately increases all his prices by the amount of the tax when it takes effect, (2) contracts with some of his vendees that he will refund to them the amount of the tax if the government refunds it to him, and (3) constantly recognizes, in other contracts and other writings, that he bears no part of the bur-

den of the tax, should still be presumed to have borne a part of that burden.

Because it continued the presumption in the face of weighty counter evidence, the Processing Tax Board in the present case necessarily failed to recognize that, with the presumption as such out of the case, the petitioner, who had the substantive burden of proving tax shift, had failed to sustain that burden. For, with the Commissioner's evidence in the case, there was nothing on the petitioner's side which would balance it—much less outweigh it as was necessary if petitioner were to sustain its burden of proof under Section 902. Hence the Circuit Court of Appeals was correct in determining that the claim should have been denied in its entirety, for there was no substantial evidence to support it.

The error thus committed was subject to judicial correction; for "when the Tax Court's factual inferences and conclusions are determinative of compliance with statutory requirements, the appellate courts are limited to a determination of whether they have any substantial basis in the evidence * * *. If a substantial basis is lacking the appellate court may then indulge in making its own inferences and conclusions or it may remand the case to the Tax Court for further appropriate proceedings". *Commissioner of Internal Revenue v. Scottish American Inv. Co.*, Nos. 52-54, 220-222, this Term, p. 4 of slip sheet.

The petitioner argues (Br., Part III), as an alternative to contending that the presumption was evidence or that it cast upon the Commissioner the burden of proving tax shift, that assuming the presumption to have disappeared from the case as a compelled inference, the Board should nevertheless have been sustained because the lower tax-period margin, upon which the presumption rested, still remained as evidence of tax absorption. It is true that the margin evidence remained in the case after the presumption was dissipated; for the authorities agree that the evidentiary core of a rebuttable presumption continues after the compelled inference has disappeared. The core of the presumption joins the rest of the proof. American Law Institute, *Model Code of Evidence*, p. 309; *Franklin Peanut Co. v. Commissioner*, 144 F. 2d 979 (C. C. A. 4th). Here there was no other evidence on behalf of the petitioner for the factual basis of the presumption to join; the margin differential stood alone.¹⁸ Its value as evidence of tax absorption was to be judged solely by its probative force without added weight by reason of its former force as the basis of a presumption. See Edgerton, J., dis-

¹⁸ The so-called "rebuttal" evidence which the petitioner adduced to support the claim that it was entitled to refund of the total tax paid will be considered in Part "C" of this brief.

sending in *Helvering v. Insular Sugar Refining Corp.*, 141 F. 2d 713, 719 (App. D. C.).

We submit that the comparative margin evidence was of so little evidentiary value that the Board could not rationally have founded a decision favorable to the petitioner upon it. The value of a tax-period reduction in margin as evidence that the claimant absorbed the tax to the extent of the reduction is intrinsically too slight to support a conclusion of absorption in the face of substantial counter evidence. The petitioner argues to the contrary; it urges (Br., Part III) that if the rational connection between the basic fact and the presumed fact were so slight, the presumption would be subject to objection as between private parties upon constitutional grounds. *Western & Atl. R. Co. v. Henderson*, 279 U. S. 639. Cf. *Mobile, J. & K. C. R. R. Co. v. Turnipseed*, 219 U. S. 35. There is no constitutional issue here, but the argument seems to be that the legislative reliance upon a comparison of margins to found a presumption lends added weight to the result of the comparison as evidence. This, however, is but to repeat the Board's error in a different form.

Moreover, when the constitutionality of the statutory presumption was being considered in *Anniston Mfg. Co. v. Davis*, 301 U. S. 337, this Court did not indicate that it believed the rational

connection between basic and presumed fact to be close. In sustaining the statute, the Court merely stated (p. 354):

But it cannot be said that the comparisons set up between the results of operations during the "tax period" and the "period before and after the tax" are *wholly irrelevant*.—[Italics supplied.]

We think that these words evidence the Court's view that the rational connection between basic fact and presumed fact was only sufficient to escape condemnation under the Constitution. But certainly this language lends no support whatever to the proposition that when the compelled inference has been dissipated, the margin differential will still constitute substantial evidence as a permissible inference of the ultimate fact, in the face of substantial countervailing proof.

A difference in the margin between the sales price of the processed commodity and the unit cost of the raw product plus the tax during the tax period and the margin during the base period would be but a slight indication of whether the claimant bore the burden of the tax, even if there were no opposing evidence. These margins take no account of the innumerable other factors affecting the selling price of commodities, such as labor costs, commissions, and cost of supplies. It is clear, for example, that a greater gross margin between the sales price of the finished product

and the cost of the raw product plus taxes may be due not to shifting the tax but to passing on to purchasers the increased cost of the taxpayer's business. The statute itself recognizes this in expressly providing that a claimant may rebut the presumption by proof that the margin change was due to factors other than the tax. Section 907 (c) (1), Appendix, *infra*. It is equally true that despite a smaller margin per unit between the sales price per unit of the processed commodity and the cost of the raw product plus processing taxes in the tax period, the decrease in the margin may not be due to the absorption of the tax by the processor. The taxpayer may still have passed the tax on to its customers. Any number of factors, or combinations of factors, may account for the margin differential. About all that can be said for the "rational connection" between the margin computation results and tax shift is that a business man normally passes on every item of expense that he can; that excise taxes of this character are usually reducible to a unit basis; and that if a taxpayer's profit remains constant under an increased tax burden, it may be supposed in the absence of contrary evidence that he has succeeded in shifting this item along with the rest. And conversely, operation at a lower profit has some tendency to show in the absence of contrary evidence that he has not succeeded, wholly or in part, in passing on the tax.

The dubious intrinsic quality of margin evidence *per se* is, we think, clearly disclosed by the Commissioner's proof in the case at bar. The following factors were shown:

(1) The universal imposition-date increase in sugar sales prices in precisely the amount of the tax.

(2) The typical account sale of petitioner's sugar which carried the tax as an "extra."

(3) The evidence that all molasses sales included the processing tax separately.

(4) The fact that petitioner's broker had collected the tax for its account on all of the 1935 sugar processing.

Any one of these items standing alone would have sufficed, we believe, to offset the marginal comparisons as evidence of tax absorption. Their combined weight did so to such an extent as to make it manifest that the Board could not rationally have founded a judgment for the petitioner upon the differential. The margin comparisons, in our judgment, were definitely not substantial evidence, and that evidence was overwhelmed by the Commissioner's proof. Cf. *Williams v. United States*, 48 F. Supp. 647 (C. Cls.), certiorari denied, 320 U. S. 750. The fact that the petitioner shifted the entire burden of the processing tax was established to so high a degree of probability that there was no rational basis for any other conclusion. Hence there was no occasion for remanding

the case to the Tax Court for further consideration there. See Edgerton, J., dissenting in *Helvering v. Insular Sugar Refining Corp.*, 141 F. 2d 713 (App. D. C.). Cf. *Commissioner v. Bain Peanut Co.*, 134 F. 2d 853 (C. C. A. 5th); *E. Regensburg & Sons v. Commissioner*, 130 F. 2d 507, 139 F. 2d 883 (C. C. A. 2d). The Circuit Court of Appeals properly directed that petitioner's claim be disallowed. See *Commissioner of Internal Revenue v. Scottish American Inv. Co.*, *supra*.

If, contrary to our contention, this Court should conclude that the comparative margin evidence has greater probative value than we contend here, we submit that the decision of the Processing Tax Board should not be reinstated, but the case should be remanded to the Tax Court for consideration freed from the Board's error of attaching continued weight to the statutory presumption.

C. PETITIONER MAY NOT SUBSTITUTE MARGIN EVIDENCE FOR A DIFFERENT PERIOD IN PLACE OF THAT COVERING THE STATUTORY BASE PERIOD, AS A FOUNDATION FOR A PRESUMPTION THAT THE TAX WAS SHIFTED IN ITS ENTIRETY

The petitioner defends the Board's partial award and therefore to the extent of that award the margin computations upon which it was based. It claims, however, that the award was a minimum one and that recovery of the total tax paid should have been awarded. It attempts to impugn the statutory margin comparison by what it terms

"rebuttal" evidence, devoting much of its brief herein to a discussion of that evidence. The gist of petitioner's argument on this phase of the case is that the base period prescribed in the statute (Section 907 (c), Appendix A, *infra*), i. e., the twenty-four months preceding imposition of the tax and the six months succeeding its invalidation,¹⁹ does not in this case afford a fair basis for comparison with the tax period. The petitioner did no processing in the six months following invalidation of the tax; and it claims that in the two-year period before the tax became effective there were many factors affecting its margin which if taken into account would demonstrate the unreliability of comparing that period with the tax period. It therefore proposes to substitute the period of its 1936 processing, beginning four months after the statutory period, for comparison with the tax period, upon the ground that the principal factors affecting its margin during that period, other than the tax, were the same as those in the tax period.

Concerning the sugar industry during the post-tax period, including the months sought to be employed by petitioner, the 1937 Report of the Secretary of Agriculture states as follows (p. 62):

The invalidation of the processing tax and production-adjustment provisions of the

¹⁹ The succeeding period is February to July, 1936, inclusive. The date of the *Butler* decision was January 6, 1936.

program resulted in an inequitable redistribution of income under the quota system. The retail price showed only a small decrease in 1936; the price averaged 5.6 per pound; but there was a loss to growers, laborers, and taxpayers, and a corresponding gain to domestic sugar processors and foreign sugar producers.

Thus, since the sales price of the sugar remained approximately the same for the 1936 crop, and since there was no processing tax to pay on this crop, the processor enjoyed a considerably larger margin of profit. If this increased margin could be used as a basis of comparison excluding all or part of the pre-tax statutory period, the margin during the tax period would appear in a much more adverse light, and a presumption based upon the comparison would indicate that the entire tax burden had been assumed.

This contention, although claimed to be in "rebuttal" of the presumption, seeks really (R. 30) to establish a more favorable presumption.²⁰ But, as we have shown, a presumption based on margin comparisons in this case would lose its effective-

²⁰ If margin evidence relating to the 1936 crop period were offered simply as evidence with respect to the ultimate question of the extent to which the tax was absorbed during the tax period, it might be pertinent and entitled to consideration, although not as the foundation of a presumption. As evidence, however, it would be far weaker than the statutory margin evidence, particularly in the face of that offered by the Commissioner in this case.

ness because of the Commissioner's evidence. It would be of no consequence that the presumed extent of the burden borne by the taxpayer was 100 per cent rather than 50 per cent if, "in contradistinction to the presumed extent", evidence is introduced, "appropriate to overcome any presumption". *Anniston Mfg. Co. v. Davis*, 301 U. S. 337, 355, 356. Petitioner's argument, therefore, would not advance his case.

In the next place, as both the Board and the court below held, petitioner is precluded from going outside the base period fixed by Congress in order to establish a presumption. Congress specifically defined the period before and after the tax which might be used, and the only exception provided was that, if the taxpayer was not in business during any part of this period, data of representative concerns similarly circumstanced might be used with the Commissioner's approval. The language used by Congress in Section 907 (c) is unequivocal, and provides the petitioner no leeway for contending that another and more advantageous period may be substituted for that fixed by Congress.

It is stated (Br. 47-48) that there was no other concern engaged in "a similar business and similarly circumstanced"; but that the petitioner's inability to point to representative concerns "for the purpose of improving the presumption and margin does not preclude giving consideration to

the fact that, because of that reason, the presumption and margin show a minimum amount of burden borne instead of a likely amount." But we think that the absence of representative concerns to permit taking advantage of the exception to the required base period calculation furnishes no reason for carving out of the statute another exception not stated. Nor does the fact that there was no processing during the six-month post-tax period justify an exception.

The unfairness in the particular circumstances of using the statutory base period in comparison with the tax period was urged upon the Circuit Court of Appeals for the Sixth Circuit in the case of *Colonial Milling Co. v. Commissioner*, 132 F. 2d 505, certiorari denied, 318 U. S. 780. The court, citing the *Anniston* case, answered that the plea was unavailing, since Congress had full power to define the period as it did. See also *Caldwell Sugars Inc. v. Commissioner*, 140 F. 2d 772 (C. C. A. 5th), petition for certiorari pending, No. 149. Somewhat similarly, the court below rejected an effort by the Government in the *Bain Peanut* case to use a method of cost computation in determining the margin comparisons other than that prescribed by the statute. We think the court below rightly said in this case (R. 75-76) that if, because of factors not considered in the margin computations, the inference based upon a comparison of the margins during the prescribed

periods would bear no reasonable relation to actuality, the inference would be arbitrary and the statutory presumption would be ~~overcome~~^{inapplicable}. No substituted presumption would, however, be established.

We do not find that either the case of *Epstein v. Helvering*, 120 F. 2d 427 (C. C. A. 4th), or that of *Arkwright Mills v. Commissioner*, 127 F. 2d 465 (C. C. A. 4th), which are relied upon here by the petitioner, lend support to its argument. The court held in the *Epstein* case that the Board of Review should not have excluded from consideration certain pertinent factors, operating within the statutory six-month post tax period, which tended to negative the presumption established by the margin evidence, which in that case was that the taxpayer had shifted the entire burden of the tax. In the *Arkwright Mills* case, the court held that the Board should have taken into account data adduced by the taxpayer for the purpose of corroborating a theory that margins in the textile industry varied proportionately to prices instead of remaining constant, even though the data included statistics with reference to prices as much as thirty months after the tax period. The evidence thus held to be relevant would not have substituted a different calculation of margins for those fixed by statute, but was designed to aid in the interpretation of the margin evidence. There is a great difference between, on the one hand, supplement-

ing by other evidence the evidence with regard to margins which the statute prescribes and, on the other hand, attempting to substitute a margin calculation covering a different period from that which the statute sets forth.

CONCLUSION

The decision of the court below should be affirmed.

Respectfully submitted,

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DECEMBER, 1944

APPENDIX A

Revenue Act of 1936, c. 690, 49 Stat. 1648:

TITLE VII—REFUNDS OF AMOUNTS COLLECTED UNDER THE AGRICULTURAL ADJUSTMENT ACT

SEC. 902. CONDITIONS ON ALLOWANCE OF REFUNDS.

No refund shall be made or allowed, in pursuance of court decisions or otherwise, of any amount paid by or collected from any claimant as tax under the Agricultural Adjustment Act, unless the claimant establishes to the satisfaction of the Commissioner in accordance with regulations prescribed by him, with the approval of the Secretary, or to the satisfaction of the trial court, or the Board of Review in cases provided for under section 906, as the case may be—

(a) That he bore the burden of such amount and has not been relieved thereof nor reimbursed therefor nor shifted such burden, directly or indirectly, (i) through inclusion of such amount by the claimant, or by any person directly or indirectly under his control, or having control over him, or subject to the same common control, in the price of any article with respect to which a tax was imposed under the provisions of such Act, or in the price of any article processed from any commodity with respect to which a tax was

imposed under such Act, or in any charge or fee for services or processing; (2) through reduction of the price paid for any such commodity; or (3) in any manner whatsoever; and that no understanding or agreement, written or oral, exists whereby he may be relieved of the burden of such amount, be reimbursed therefor, or may shift the burden thereof; or

(b) That he has repaid unconditionally such amount to his vendee (1) who bore the burden thereof, (2) who has not been relieved thereof nor reimbursed therefor, nor shifted such burden, directly or indirectly, and (3) who is not entitled to receive any reimbursement therefor from any other source, or to be relieved of such burden in any manner whatsoever. (7 U. S. C., Sec. 644.)

SEC. 903. FILING OF CLAIMS.

No refund shall be made or allowed of any amount paid by or collected from any person as tax under the Agricultural Adjustment Act unless, after the enactment of this Act, and prior to July 1, 1937, a claim for refund has been filed by such person in accordance with regulations prescribed by the Commissioner with the approval of the Secretary. All evidence relied upon in support of such claim shall be clearly set forth under oath. The Commissioner is authorized to prescribe by regulations, with the approval of the Secretary, the number of claims which may be filed by any person with respect to the total amount paid by or collected from such person as tax under the Agricultural Adjustment Act, and such regulations may require that claims for refund of processing taxes with respect to any commodity or group of commodities

shall cover the entire period during which such person paid such processing taxes. (7 U. S. C., Sec. 645.)

SEC. 906. PROCEDURE ON CLAIMS FOR REFUNDS OF PROCESSING TAXES.

(a) Notwithstanding any other provision of law, no suit or proceeding, whether brought before or after the date of the enactment of this Act, shall be brought or maintained in any court for the refund of any amount paid or collected as processing tax, as defined herein, under the Agricultural Adjustment Act, except as provided in this section. The Commissioner shall allow or disallow, in whole or in part, any claim for refund of any such amount within three years after such claim was filed, unless such time has been extended by written consent of the claimant.

(b) There is hereby established in the Treasury Department a Board of Review (hereinafter referred to as "the Board"). The Board shall be composed of nine members who shall be officers or employees of the Treasury Department designated by the Secretary of the Treasury. * * * The Board shall have jurisdiction in proceedings under this section to review the allowance or disallowance of the Commissioner of a claim for refund, and to determine the amount of refund due any claimant with respect to such claim. The Commissioner shall make refund of any such amount determined by a decision of the Board which has become final. The proceedings of the Board and its divisions shall be conducted in accordance with such rules and regulations as the Board may prescribe, with the approval of the Secretary.

(c) The allowance or disallowance of the Commissioner of a claim for refund under

this section shall be final, unless within three months after the date of mailing by registered mail by the Commissioner of notice that a claim for refund of any such amount has been disallowed, in whole or in part, the claimant files a petition with the Board requesting a hearing on the merits of his claim, in whole or in part. * * *

* * * * *

(g) A review of the decision of the Board, made after the hearing provided in this section, may be obtained by the claimant or Commissioner by filing a petition for review in the Circuit Court of Appeals of the United States within any circuit wherein such claimant resides, or has his principal place of business, or, if none, in the United States Court of Appeals for the District of Columbia, or any such court which may be designated by the Commissioner and the claimant by stipulation in writing, within three months after the date of the mailing to the claimant and the Commissioner of the copy of the findings and decision of the Board. A copy of such petition shall forthwith be served upon the Commissioner or upon any officer designated by him for that purpose, or upon the claimant, according to which party files such petition, and upon the Board. Thereupon the Board shall certify and file in the court, in which such petition has been filed, a transcript of the record upon which the findings and decision complained of were based. Upon the filing of such transcript such court shall have exclusive jurisdiction to affirm the decision of the Board, or to modify or reverse such decision, if it is not in accordance with law, with or without remanding the cause for a rehearing, as

justice may require. No objection shall be considered by the court unless such objection shall have been urged before the Board or division and the presiding officer, or unless there were reasonable grounds for failure so to do. If the claimant or the Commissioner shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material, and that there were reasonable grounds for failure to adduce such evidence in the hearing before the presiding officer, the court may order such additional evidence to be taken before such officer, and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Board may modify its findings of fact and decision by reason of the additional evidence so taken and it shall file with the court such modified or new findings and decision. The judgment of the court shall be final, subject to review by the Supreme Court of the United States, upon certification or certiorari as provided in sections 239 and 240 of the Judicial Code, as amended. Such courts are authorized to adopt rules for the filing of petitions for review, the preparation of the record for review, and the conduct of the proceedings on review. If the decision of the Board is affirmed, costs shall be awarded against the claimant, and if such decision is reversed, the judgment shall provide for a refund of any costs paid by the claimant. In case of modification of such decision costs shall be awarded or refused as justice may require. The decision of the Board made after the hearing provided herein shall become final

in the same manner that decisions of the Board of Tax Appeals become final under section 1005 of the Revenue Act of 1926, as amended.

(7 U. S. C., Sec. 648.)

SEC. 907. EVIDENCE AND PRESUMPTIONS.

(a) Where the refund claimed is for an amount paid or collected as processing tax, as defined herein, it shall be prima-facie evidence that the burden of such amount was borne by the claimant to the extent (not to exceed the amount of the tax) that the average margin per unit of the commodity processed was lower during the tax period than the average margin was during the period before and after the tax. If the average margin during the tax period was not lower, it shall be prima-facie evidence that none of the burden of such amount was borne by the claimant but that it was shifted to others.

(b) The average margin for the tax period and the average margin for the period before and after the tax shall each be determined as follows:

(1) *Tax Period.*—The average margin for the tax period shall be the average of the margins for all months (or portions of months) within the tax period. The margin for each such month shall be computed as follows: From the gross sales value of all articles processed by the claimant from the commodity during such month, deduct the cost of the commodity processed during the month and deduct the processing tax paid with respect thereto. The sum so ascertained shall be divided by the total number of units of the commodity processed during such month, and the resulting figure shall be the margin for the month.

(2) *Period Before and After the Tax.*—

The average margin for the period before and after the tax shall be the average of the margins for all months (or portions of months) within the period before and after the tax. The margin for each such month shall be computed as follows: From the gross sales value of all articles processed by the claimant from the commodity during such month, deduct the cost of the commodity processed during the month. The sum so ascertained shall be divided by the number of units of the commodity processed during such month, and the resulting figure shall be the margin for the month.

(3) *Average Margin.*—The average margin for each period shall be ascertained in the same manner as monthly margins under subdivisions (1) and (2), using total gross sales value, total cost of commodity processed, total processing tax paid, and total units of commodity processed, during such period.

(4) *Combination of Commodities.*—Where, as, for example, in the case of certain types of tobacco, the articles produced and sold by the claimant are the product of several commodities combined by him during processing, the average margins shall be established with respect to such commodities as a group, and not individually, in accordance with rules and regulations prescribed by the Commissioner, with the approval of the Secretary of the Treasury.

(5) *Cost of Commodity.*—The cost of commodity processed during each month shall be (a) the actual cost of the commodity processed if the accounting procedure of the claimant is based thereon, or

(b) the product computed by multiplying the quantity of the commodity processed by the current prices at the time of processing for commodities of like quality and grade in the markets where the claimant customarily makes his purchases.

(6) *Gross Sales Value of Articles.*—The gross sales value of articles shall mean (a) the total of the quantity of each article derived from the commodity processed by the claimant during each month multiplied by (b) the claimant's sale prices current at the time of processing for articles of similar grade and quality.

(7) The quantity of each article derived from the commodity processed may be either (a) the actual quantity obtained, as shown by the records of the claimant, or (b) an estimated quantity computed by multiplying the quantity of commodity processed by appropriate conversion factors giving the quantity of articles customarily obtained from the processing of each unit of the commodity.

(c) The "tax period" shall mean the period with respect to which the claimant actually paid the processing tax to a collector of internal revenue and shall end on the date with respect to which the last payment was made. The "period before and after the tax" shall mean the twenty-four months (except that in the case of tobacco it shall be the twelve months) immediately preceding the effective date of the processing tax, and the six months, February to July, 1936, inclusive. If during any part of such period the claimant was not in business, or if his records for any part of such period are so inadequate as not to provide satisfactory data on prices paid for com-

modities purchased or prices received for articles sold, the average prices paid or received by representative concerns engaged in a similar business and similarly circumstanced may with the approval of the Commissioner, where necessary for a fair comparison, be substituted in making the necessary computations. If the claimant was not in business during the entire period before and after the tax, the average margin, during such period, of representative concerns engaged in a similar business and similarly circumstanced, as determined by the Commissioner, shall be used as his average margin for such period.

(d) If the claimant made any purchase or sale otherwise than through an arm's-length transaction, and at a price other than the fair market price, the Commissioner may determine the purchase or sale price to be that for which such purchases or sales were at that time made in the ordinary course of trade.

(e) Either the claimant or the Commissioner may rebut the presumption established by subsection (a) of this section by proof of the actual extent to which the claimant shifted to others the burden of the processing tax. Such proof may include, but shall not be limited to—

(1) Proof that the difference or lack of difference between the average margin for the tax period and the average margin for the period before and after the tax was due to changes in factors other than the tax. Such factors shall include any clearly shown change (A) in the type or grade of article or commodity, or (B) in costs of production. If the claimant asserts that the burden of the tax was borne by him and

the burden of any other increased costs was shifted to others, the Commissioner shall determine, from the effective dates of the imposition or termination of the tax and the effective date of other changes in costs as compared with the date of the changes in margin (when margins are computed for weeks, months, or other intervals between July 1, 1931, and August, 1936, in the manner specified in subsection (b)), and from the general experience of the industry, whether the tax or the increase in other costs was shifted to others. If the Commissioner determines that the difference in average margin was due in part to the tax and in part to the increase in other costs, he shall apportion the change in margin between them;

(2) Proof that the claimant modified existing contracts of sale, or adopted a new form of contract of sale, to reflect the initiation, termination, or change in amount of the processing tax, or at any such time changed the sale price of the article (including the effect of a change in size, package, discount terms, or any other merchandising practice) by substantially the amount of the tax or change therein, or at any time billed the tax as a separate item to any vendee, or indicated by any writing that the sale price included the amount of the tax, or contracted to refund any part of the sale price in the event of recovery of the tax or decision of its invalidity; but the claimant may establish that such acts were caused by factors other than the processing tax, or that they do not represent his practice at other times. If the claimant processed any product in addition to the commodity with respect to the processing of which there was

paid or collected an amount as tax for which he claims a refund, and if the Commissioner has reason to believe that the burden of such amount was shifted in whole or in part by means of the transactions relating to such product, the average margin with respect to such product, and articles processed therefrom, shall also be considered, and shall be determined for the tax period applicable to the commodity and for the period before and after the tax in the manner prescribed in subsection (b) of this section. To the extent the Commissioner determines that the average margin with respect to such product was higher during the tax period than it was during the period before and after the tax, it shall be prima-facie evidence that such amount was not borne by the claimant but that it was shifted to others.

(7 U. S. C., Sec. 649.)

SEC. 916. RULES AND REGULATIONS.

The Commissioner shall, with the approval of the Secretary, prescribe such rules and regulations as may be deemed necessary to carry out the provisions of this title.

(7 U. S. C., Sec. 658.)

Revenue Act of 1939, c. 247, 53 Stat. 862:

* SEC. 405. FILING OF CLAIMS FOR REFUND OF AMOUNTS COLLECTED UNDER THE AGRICULTURAL ADJUSTMENT ACT.

Section 903 of the Revenue Act of 1936 (relating to expiration of time for filing claims for refund of amounts paid under the Agricultural Adjustment Act) is amended by striking out "July 1, 1937" and inserting in lieu thereof "January 1, 1940".

(7 U. S. C., Sec. 645.)

APPENDIX B

S. Rep. 2156, 74th Cong., 2nd Sess., pp. 32-34
(1939-1 Cum. Bull. (Part 2) 678, 699-702)

TITLE VII. REFUNDS OF AMOUNTS COLLECTED UNDER THE AGRICULTURAL ADJUSTMENT ACT

GENERAL STATEMENT

Your committee recommends the adoption of this title, as an amendment to the House bill, as necessary to the protection of the revenue and to the practical administration of a large and extremely difficult class of refund cases.

This title will introduce certain necessary provisions into the internal-revenue laws relating to a particular class of refunds. The provisions of the title relate to the making of refunds of amounts which have been collected under the Agricultural Adjustment Act. It is of the utmost importance that the provisions of section 21 (d) of the Agricultural Adjustment Act, which now deals with that subject, be revised, both from an administrative standpoint and to remove certain legal objections that have been urged with respect to that section.

NECESSITY FOR TITLE VII

Title VII consists entirely of a revision of the provisions of section 21 (d) of the Agricultural Adjustment Act and related provisions. That section now provides that

no recovery or refund shall be made or allowed of any amounts paid or collected under the Agricultural Adjustment Act, unless the claimant establishes to the satisfaction of the Commissioner of Internal Revenue that he has borne the economic burden of the tax for which refund or recovery is sought. * * *

The imperative need of revising these provisions is apparent from a consideration of the administrative burden which confronts the Bureau of Internal Revenue, if claims for refund under the Agricultural Adjustment Act must be passed on under the provisions of section 21 (d) in its present form. * * *

The revision of the provisions of section 21 (d) contained in Title VII adheres to the fundamental principle of equity applicable in respect to claims for refund, namely, that the claimant secure a refund only with respect to the amount of tax of which he bore the economic burden. However, the procedure in the handling of these claims has been modified so as to diminish in so far as possible the administrative burden involved in passing on them. * * *

The question as to whether processing taxes were passed on, however, involves extremely complicated economic and accounting considerations. The great bulk (approximately \$850,000,000) of the moneys collected under the Agricultural Adjustment Act consisted of such taxes, but they were paid by a relatively small number of taxpayers. With respect to such claims, therefore, it is contemplated that the claimant present his claim for consideration by the Commissioner initially without any formal hearing. If the claimant is then

dissatisfied with the Commissioner's decision, he may obtain a formal hearing in the Bureau of Internal Revenue. A transcript of the record of such hearing will be prepared and will serve as a basis of review by the circuit courts of appeal and the Supreme Court.

Apart from the administrative considerations which necessitate a revision of the provisions of section 21 (d) in its present form, the contentions raised by taxpayers in over 200 suits, which are now pending in the courts, present legal considerations which make such revision equally necessary. The validity of section 21 (d) has been challenged in the courts in several respects. It has been contended that while that section states the conditions under which the Commissioner may deny a refund of taxes paid, it does not establish affirmatively any conditions, compliance with which will enable the claimant to secure a refund. It has been further argued that section 21 (d) is so vague and indefinite as not to provide a claimant with an adequate remedy at law for a recovery of the amounts illegally exacted. Section 21 (d) has also been challenged by the contention that the statute in terms seems to forbid a refund with respect to any amount, if any part of such amount has been passed on by the taxpayer. Another serious legal argument advanced relates to the fact that section 21 (d) does not provide that the Commissioner must hold a hearing with respect to a claim within a fixed period of time. Because of that fact, it has been urged that the Commissioner may defer action indefinitely until after the statute of limitations

has run, and thus deprive a claimant of his right of recourse to the courts.

The revision of the provisions of section 21 (d) contained in title VII deals with each one of these contentions and seeks to meet all the legal objections which have been raised in the courts with respect to that section. Section 907 of title VII contains provisions under which a claimant may establish a prima-facie case for securing a refund and sets forth definite factors and considerations to be taken into account in determining whether or not a claimant bore the burden of the tax for which refund was sought. Provision is made requiring the Commissioner to hold a hearing on processing-tax claims within 2 years after such hearing is sought by the claimant.

EXPLANATION OF TITLE VII

* * * *

Section 902 adheres to the basic principle that no refunds may be made of amounts collected under the Agricultural Adjustment Act, except to the extent to which the claimant establishes to the satisfaction of the Commissioner of Internal Revenue, or to the satisfaction of the trial court, as the case may be, that he bore the economic burden of such amounts. * * *

* * * *

Section 907 sets forth presumptions whereby a claimant may make out a prima facie case as to the extent to which he bore the burden of the tax, and show that he is entitled to a refund to that extent. The method employed is a comparison between the average margin, i. e., the spread between the tax and the cost of the basic commodity subject to the processing tax and

the receipts of articles derived from the commodity, for the period during which the claimant actually paid processing taxes, and the margin for a period combining the 24 months preceding the effective date of the tax and the 6 months after the invalidation of the Agricultural Adjustment Act from February to July 1936, inclusive.

* * * * *



FILE COPY

IN THE
Supreme Court of the United States

OCTOBER TERM, 1944

No. 148

WEBRE STEIB COMPANY, LTD., *Petitioner,*

V.

COMMISSIONER OF INTERNAL REVENUE, *Respondent.*

ON WRIT OF CERTIORARI TO THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF AMICI CURIAE.

RICHARD B. BARKER,
JOHN C. REID,
Southern Building
Washington, D. C.



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IN THE
Supreme Court of the United States

OCTOBER TERM, 1944

No. 148

WEBER STEIB COMPANY, LTD., *Petitioner,*

v.

COMMISSIONER OF INTERNAL REVENUE, *Respondent.*

ON WRIT OF CERTIORARI TO THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE FIFTH CIRCUIT

**PETITION FOR LEAVE TO FILE BRIEF
AMICI CURIAE.**

The undersigned respectfully petition this Court for leave to file the subjoined brief as amici curiae. The Solicitor General and counsel for petitioner have consented in writing as indicated by letters filed with the Clerk of the Court.

RICHARD B. BARKER

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Southern Building
Washington, D. C.

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BRIEF AMICI CURIAE.

INTRODUCTORY STATEMENT.

The Circuit Court of Appeals properly stated that "The crucial question presented is whether the taxpayer . . . established that it bore, in whole or in part, the ultimate economic burden of the tax paid." The Court, however, indicated its confusion as to the *nature* of this question by relying on a certain type of evidence as dissolving the statutory presumption created by Section 907 of the Revenue Act of 1936. The type of evidence to which we refer may be characterized as "Subjective Evidence," since it was evidence of what the parties to transactions *thought* or *said* on the subject of tax shifting or the inclusion of tax in the selling price, or the collection of the tax from vendees. We undertake in this brief to show that the evidence of that kind relied on by the court below was not *substantial* evidence such as would dissolve the presumption.

We have no quarrel with the lower court's holding "That the statutory presumption, when rebutted, disappears entirely from the case." We agree that when any real, substantial evidence is introduced which tends to show the extent to which the tax was shifted or borne by the taxpayer, the presumption itself is dissolved and cannot be weighed as evidence against evidence. We agree with the petitioner that after a presumption is thus rebutted the basic facts on which it operated, i. e., the margin figures for the tax period and the period before and after the tax, remain in the case as evidence, for what they are worth as evidence but without any *artificial* force.

If the presumption had been dissolved here, the margin figures for various periods put in evidence by petitioner may or may not be sufficient by themselves to justify a finding that petitioner bore some part of the tax burden. This is a complex and difficult question of economic fact with which we are not concerned in this brief.

We are, however, very much concerned with the question as to the evidentiary weight to be given to "subjective evidence." And so are many processors whose cases are now before the Bureau of Internal Revenue and the lower courts. In holding that the presumption had been rebutted, the court below relied entirely on findings by the Processing Tax Board of Review that the price of sugar increased by the amount of the tax on the date of its imposition, that in the accounts stated between petitioner and its broker the processing tax was shown as a separate item, and that in a letter dated January 17, 1936 to petitioner from its broker the latter stated that the processing tax had been included in the price of petitioner's sugar and that,

"Therefore you have not paid any more tax than you collected and these sugars in warehouse here and elsewhere, that is Chicago or [are] really tax free."

The Board had ignored these findings and determined on the basis of marginal evidence that the claimant was entitled

to a partial refund. The court below, however, ignored the marginal evidence and denied petitioner's claim in its entirety *solely* on the basis of these findings, stating,

"Upon evidence before it the Board found that the claimant had participated in a universal increase in the selling price of sugar, effective as of the moment the processing tax was imposed, to cover the amount of the tax; and that claimant had collected from its vendees all taxes, for the entire period of the tax, assessed upon the processing of molasses, and all taxes for processing sugar during the year 1935. These findings are not attacked. Moreover, there was no showing that this policy of shifting the burden of the tax, thus shown to exist at the beginning and end of the tax period, did not continue throughout the effective period of the taxing statute. This evidence clearly was sufficient to dissolve the presumption, and since there was no other proof to support any refund, the claim should have been disallowed in its entirety."

It is barely possible that the actual decision of the Circuit Court was correct because of the state of the record in this particular case. But the language used by the Court and set out above indicates a lack of understanding of the fundamental principles involved in a determination of tax incidence. The purpose of this brief, therefore, is to urge the Court, whatever its actual decision, to correct the erroneous theory of the court below and enunciate the proper principles for the determination of tax incidence.

ARGUMENT.

(1) The Test for Determining Tax Incidence.

In placing upon the courts the duty of determining the extent to which a processor shifted the burden of the processing tax, Congress gave the courts one of the most difficult jobs ever to be thrust upon them. The Senate Finance Committee recognized this in enacting Title VII of the Revenue Act of 1936 when it said (S. Rep. No. 2156, 74th Congress, 2nd Session)

“ * * * the question as to whether processing taxes were passed * * * involves extremely complicated economic and accounting considerations.”¹

• A reasonably intelligent solution of this problem is difficult at best, but it is utterly impossible unless the nature of the problem is understood. It is absolutely necessary to know, and keep constantly in mind, the basic test for determining the extent to which the burden of a tax is shifted or borne by the one who pays it. The universally accepted test may be expressed in many ways but it always involves a comparison of the taxpayer's actual economic position during the tax period with a reasonable estimate of what the taxpayer's economic position would have been in the absence of the tax but with all other factors as they were. There is always involved a comparison of what actually happened with what would have happened without the tax. Stated in terms of prices, the tax burden borne is measured by a comparison of the prices which actually prevailed during the tax period with what such prices would have been without the tax. Stated in terms of margins, the tax burden borne is measured by a comparison of the margins which actually prevailed during the tax period with what such margins would have been in the absence of the tax. Stated in terms of net profits, the test is the extent to which net profits were lower in the tax period than they would have been in the absence of the tax. The same idea is present when the subject of the tax burden borne is discussed in terms of injury to the processor. A processor has been injured by the tax, and therefore has borne some part of the burden of the tax, if his net economic situation during the tax period was worse than it would have been in the absence of the tax. But, however it is stated, any determination of tax incidence involves a comparison of the prices, margins, or profits *actually obtained* with an intelligent esti-

¹See Appendix for the views of economists on some of these complicated economic considerations.

mate of the prices, margins, or profits *which would have been obtained* in the absence of the tax.

The test enunciated above is not only universally accepted by economists, but it has also been adopted by the Government in relation to cases under Title VII of the Revenue Act of 1936. In a publication entitled "An Analysis of the Effects of the Processing Tax Levied Under the A.A.A." prepared by the Bureau of Agricultural Economics and published by the Bureau of Internal Revenue, it is stated (p. 4):

"Any analysis of tax incidence is based fundamentally upon an appraisal of what prices and margins *would have been* in the absence of the tax." (Emphasis supplied.)

The same view is set out in greater detail in an article written, apparently with official sanction, by Wirth F. Ferger, an economist in the Department of Agriculture, and published in the March 1937 issue of the American Economic Review. In that article Dr. Ferger states:

"It is recognized that the *proof of the incidence of a tax is a matter of economic and statistical inference rather than of simple and easily ascertained fact.* * * *

"Our problem of inference consists in comparing the prices received and the prices paid by a processor at the time he was paying the processing tax, with what those prices *would have been at that time* in the absence of the tax but with all other conditions as they were. The inferential nature of the problem is obvious, since 'what would have been' is an inference rather than a simple objective fact. * * *" (Emphasis supplied.)

It is important to note, moreover, that the then Secretary of Agriculture Wallace adopted this same concept in explaining Title VII of the 1936 Act to the Senate Finance Committee. He said:

“Accordingly, if the processor shifted the burden of the tax, either by increasing his selling price down [above?], or by reducing his buying price below, *what it otherwise would have been*, this would be evidenced by an increase in his gross operating margin retained during the tax period.” (Emphasis supplied.)

In *Arkwright Mills v. Commissioner*, 127 F.(2d) 465, the Court stated,

“We understand the Board to hold that the evidence as to change in demand in the periods chosen by Congress for comparison should be ignored because the evidence represents merely an attempt to show what the taxpayer’s margin would have been during the tax period if there had been no tax; and because this effort involves the setting up of a hypothetical or imaginary situation which has no tendency to prove the actual extent to which the taxpayer bore the burden of the tax. This point of view in our opinion cannot be maintained. In the first place it is manifest that the statutory test, which Congress itself devised, *involves a comparison of the taxpayer’s actual position during the tax period with what it would have been if there had been no tax.* * * *” (Emphasis supplied.)

(2) “Subjective” Evidence.

Having set forth the basic test for determining the extent to which the burden of a tax is shifted or borne, let us apply that test to the facts upon which the Circuit Court relied in the present case.

(a) *Initial Price Increase.*

The Board found that the taxpayer participated in a general price increase in the amount of the tax on the date the tax was first imposed. This price increase, of course, involves something more than the “subjective” evidence with which this brief is principally concerned. An actual rise in prices is an objective economic fact. It would be possible to infer in the absence of explanation that the price *imme-*

diately after the increase was greater by the amount of the tax than it would have been in the absence of the tax. But the tax was in effect for two years, and the price changed constantly after the imposition of the tax. Also the record shows that the claimant actually realized a lower price per ton on the 1934 crop than on either the 1935 crop or the 1933 crop.² It is reasonable to assume, merely because of an initial price increase in the amount of the tax, that during the *entire* tax period the processor was not injured by the tax?

Normally, an arbitrary price increase encounters resistance from buyers, thus forcing the sellers to reduce the price at least to some extent. And to buyers, a price increase is a price increase, no matter what reason the seller gives for making it. Prices change for a great variety of reasons, but principally by reason of the operation of the law of supply and demand. Is it reasonable to suppose that, once a processor has increased his price by the amount of the tax, all subsequent price changes are irrelevant to the question of tax incidence and from then on his prices are greater by the amount of the tax than they would have been in the absence of the tax? Such an assumption would, of course, be an absurd over-simplification of a complicated problem in economics.³

There was another factor in this situation of which the Court can take judicial notice and which is of crucial importance in understanding this initial price increase. A floor stock tax was imposed on all commodities held for sale on the date of the imposition of the processing tax. Consequently, when a wholesaler or converter purchased a ton of sugar from a processor during the period immediately

²In the present case, moreover, the petitioner had no sugar to sell and was not in the market until several months after the imposition of the tax.

³See Appendix for statements by various economists as to the difficult problems involved in determining tax incidence.

preceding the imposition of the tax, he purchased it knowing he would have to pay a floor stock tax on it before he could get rid of it. He purchased not only a ton of sugar but also a tax liability. The "real" price of the sugar to the purchaser immediately prior to the imposition of the tax was the amount paid to the processor plus the amount of floor stock tax payable on that sugar. Immediately after the imposition of the processing tax the "real" price was the amount paid to the processor. In this situation, a price increase in the exact amount of the tax on the date of the imposition of the tax was automatic and inevitable. Under these particular circumstances such an increase does not prove anything at all about the tax burden borne by the processor. It was merely a technical price adjustment having no effect on the real economic price of the sugar. In this respect it was somewhat comparable, although in reverse, to the situation in which a stock is sold on the stock exchange "dividend on" or "ex-dividend". One day a stock sells for \$105 per share, "dividend on", while the next day it sells for \$100 per share "ex-dividend", yet the real price of the stock remains the same. It makes no difference to a purchaser whether he pays \$105 for a share of stock and receives immediately a dividend of \$5 or whether he pays \$100 without getting a dividend for another year.

That the initial price increase in processing tax cases was merely technical, and meaningless for purposes of the present inquiry, can best be shown by example. In the cotton industry the processing tax went into effect on August 1, 1933, and a floor stock tax was imposed on all cotton goods held for sale on that date. Let us assume the case of a cotton processor who shifted the entire burden of all processing taxes paid by him. On July 31, 1933, he sold his product for 20c per pound. On August 1, 1933, *with exactly the same market conditions* except for a tax of 4c per pound, he sold his product for 24c a pound. Yet because of the floor stock tax, his vendee paid exactly the same amount for the product on both days. In the case of

the goods purchased on July 31, 1933, he paid 20c to the processor and 4c to the Treasury Department, and in the case of the goods purchased on August 1, 1933, he paid the entire 24c to the processor. Consequently, the price increase by the processor on August 1, 1933 was meaningless in any consideration of the actual economic price of the goods. It was purely a paper increase.

Now let us assume the case of a processor who bore the entire burden of all processing taxes paid by him. The market would absorb his product at a price of 20c a pound but was such that he could not obtain a higher price. During the period immediately preceding August 1, 1933, his vendees were willing to pay 20c a pound for his product, but were not willing to pay 20c to him and another 4c to the Treasury Department. Consequently, the processor's price was gradually depressed to 16c a pound on July 31, 1933,⁴ although the real price to his vendees was 20c because of the floor stock tax payable by them. On August 1, 1933, *with no change in market conditions*, the processor's price was increased to 20c a pound which, as far as the vendee was concerned, was the real economic price all along. In this situation, the price received by the processor before the imposition of the tax was less by the amount of the tax than it would have been in the absence of the tax. After the imposition of the tax the processor's price in our example was exactly the same as it would have been in the absence

⁴Actual figures during July and August should not be compared with this hypothetical example. The example assumes that all other marketing factors, except the tax, remained unchanged. Actually, cotton textile prices increased from July 17, 1933, when N.R.A. became effective, to July 31, 1933. Thus, actual prices may have risen from 15c to 20c between those dates; but, on our assumption, if there had been no tax the price would have gone to 24c on July 31, 1933. The price was therefore lower than what it otherwise would have been if there had been no tax, by 4c, because the processor absorbed the burden of the floor stock tax payable by his vendee after August 1, 1933.

of the tax. The processor therefore not only bore the burden of the tax paid by him but also the burden of the floor stock tax paid by his vendee.

The purpose of these examples is not to prove any specific facts about the burden borne by processors⁵ but to show that, in view of the floor stock tax, the fact of an initial increase in processors' prices is meaningless in relation to the problem of determining the actual economic incidence of the processing tax. As shown by the above examples, the fact of an initial price increase is consistent either with complete tax shift or with complete tax absorption by the processor. It is also consistent with partial tax absorption by the processor. Consequently, merely as a matter of logic and common sense no weight can be given to the mere fact of an increase in processors' prices on the date of the imposition of the processing tax. Such increases were technical market adjustments necessitated by the presence of the floor stock tax. When the Circuit Court in the present case laid such great emphasis on the initial price increase in the claimant's industry, it demonstrated a complete failure to understand the relation between the processing tax and the floor stock tax. This lack of understanding resulted in attributing great significance to a fact which had no significance whatsoever. A fact which is equally consistent with the argument on either side of a case cannot have evidentiary weight.

(b) *Tax Billed as a Separate Item.*

The Board found, as stated above, that in the accounts stated between the claimant and its broker with respect to sales of molasses the tax was shown as a separate item.

⁵It is interesting to note, however, that the price of sugar was depressed during the period immediately prior to the imposition of the processing tax, indicating that the processors were bearing some part of the burden of the floor stock taxes payable as of June 8, 1934 by their vendees.

From the record it appears that this billing method existed only between the claimant and its broker, and did not extend to claimant's vendees. In the final analysis, however, it would make no difference, so it will be assumed purely for the sake of argument that the customer paid for his purchases upon the basis of invoices showing the tax as a separate item. The Board also found that claimant's broker had written claimant a letter stating that "you have not paid any more tax than you collected and these sugars in warehouses * * * [are] really tax free." Upon the basis of these findings the Circuit Court decided that "claimant had collected from its vendees all taxes, for the entire period of the tax. * * * Moreover, there was no showing that this *policy* of shifting the burden of the tax * * * did not continue throughout the effective period of the taxing statute."

It is submitted that these findings of the Board have little or no relevance in the present inquiry and that the Court's emphasis on them indicates an erroneous view as to the basic principles involved in the case. The key to the Court's confusion is contained in its use of the word "policy" in its statement that claimant pursued a "policy" of shifting the tax burden. Of what conceivable assistance, in a complicated economic inquiry such as is involved in the present case, is a finding from which it can be inferred that claimant had a "policy" of shifting the tax burden? Of course, claimant *tried* to shift the tax burden. All processors did. All processors hoped they were succeeding. And many processors *thought* they were shifting some or all of the tax burden. Undoubtedly almost all purchasers thought the tax was being shifted to them. But this evidence as to the state of mind of processors and their customers has very little bearing on the question of what actually happened. To determine what actually happened requires a painstaking inquiry by experts into a difficult problem in economics.

To illustrate the absurdity of this subjective approach, let us assume two processors, "A" and "B", who manufactured the same articles, sold in the same market, and

paid the same processing tax. "A" sold his articles under invoices stating "price 20c, tax 4c." "B" sold his articles for a flat price of 24c, making no reference to the tax. Under the subjective approach "A" would be regarded as having shifted the entire burden of the tax while "B" would presumably be considered as having absorbed the tax. Yet obviously, as a matter of objective fact, both "A" and "B" shifted the tax burden to exactly the same extent. A price is a price no matter how it is set up on an invoice. The problem is to determine the extent to which the price obtained was greater than the price which would have been obtained in the absence of the tax.

That the Circuit Court was not cognizant of the test for determining tax incidence is further shown by its reliance on a letter to the claimant from its broker stating that claimant had collected all the tax he had paid. The Court appeared to believe that this was strong evidence that claimant had shifted the entire economic burden of the tax. Analysis shows that no such inference is justified. In the first place, it is clear from the broker's use of the words "tax free" in describing the sugar sold by claimant but still in a warehouse, that in his mind the important considerations were that the tax had been paid by claimant so that the sugar would be subject to no further tax and that claimant had received all he could ever receive for the sugar. In the second place, it is highly unlikely that the broker had any thoughts at all about the precise economic incidence of the tax. There was no reason at that time for him to have the problem in mind. Even if he had, his opinion on the subject would be entitled to no weight.

This same misconception as to the real issue has been adopted by respondent in other cases where on his invoice or sales contract the processor has stated a flat price and followed it with the notation "price includes tax." What did this notation mean? Actually, it meant no more than that the tax had been paid and that the vendee would not be subjected to tax. Respondent has frequently contended

that the phrase meant that the tax was a part of, or "buried in", the price and that therefore the entire burden of the tax had been shifted. This is a complete non-sequitur. The tax was a cost, and in the sense that all costs are represented to some extent in the price, the tax might be considered as having been "buried in the price." But stating this accomplishes nothing. The question is whether or to what extent the economic burden of the tax was shifted and this can only be determined by comparing prices received with what those prices would have been in the absence of the tax.

When examined, the whole argument in support of subjective evidence is an argument that, *whether or not* a processor *actually* bore any part of the burden of the tax, he is denied any recovery if he made representations to the effect that he shifted such burden. This argument avoids the real issue in controversy and seeks to have the case decided on some theory of an admission against interest or estoppel. A processing tax case is not a criminal prosecution, and theories such as these have no bearing on the problem.

It cannot be emphasized too strongly that the question involved is whether or not in actual fact, the prices actually received were such that the processing tax was passed on, or whether the prices were such that the burden of the processing tax remained at least in part on the processor. This is a question which cannot be answered by resort to a processor's conception of what he thought he was doing at the time the tax was in effect, or to what his broker or vendee thought was happening, but only after a painstaking analysis and comparison of the prices actually received by the processor for his goods and by an appraisal of other economic evidence. In this light, any statements, however articulate, as to what the processor thought he was doing or hoped to do, can obviously be given no real weight as against evidence of what such prices actually were, and how they compared with what prices would have been in the absence of the processing tax.

That it is the actual economic facts rather than the subjective trimmings which are important was recognized very clearly by the Circuit Court of Appeals for the Seventh Circuit in *Cudahy Packing Co. v. United States*, 126 F.(2d) 429. A floor stock tax was involved in that case rather than a processing tax but the same principles control. Moreover, the situation was the reverse of that in the present case since the Government was arguing that economic facts control over subjective evidence or the lack of it. The District Court entered judgment for the claimant for the entire amount of tax paid on the ground that the claimant had *not* billed the tax as a separate item, or "added or included in the prices of its products any identifiable amount of floor stock taxes." The Circuit Court reversed this decision, stating, (p. 431)

"Although the phrase 'economic burden' is not used in the section, any other interpretation of the word burden would do violence to the language and purpose of the section. This conclusion is also sustained by Senate Report No. 2156 of the Committee on Finance, pp. 32-34, 74th Cong. 2nd Sess.

"There is no doubt that the shifting of the burden in the economic sense requires more exhaustive and difficult proof than the legal test. The measure is not confined merely to acts of the taxpayer; it rests in the economic forces at play, forces over which the average individual has little, if any, control. One force, to be sure, may be the tax, but that makes no less real the other economic forces contributing to the resultant."

Perhaps the best statement with respect to the evidentiary value of subjective evidence in the face of actual economic facts is contained in the court's opinion in *Arkwright Mills v. United States*, 49 Fed. Supp. 970, aff'd (CCA-4) 139 F.(2d) 454. The court stated, (p. 972)

"Defendant claimed to have evidence that plaintiff had shifted the burden of the tax in some correspondence in which its sales agent said that it was understood

that 'price includes tax.' Plaintiff produced evidence, explaining that this only meant that there would be no further billing for the tax, but this was really unnecessary, *for what was meant or said or understood is not the test of whether a tax burden is shifted.* C. B. Cones & Sons Mfg. Co. v. United States, 7 Cir., 123 F.(2d) 550. The test is the economic difference between what a seller would have realized if there had been no tax and what he did realize after becoming liable for the tax. Arkwright Mills v. Commissioner, 4 Cir., Dec. 18, 1941, 127 F.(2d) 465. * * *

"If any of the burden was shifted, it was by the collection from purchasers of an amount in excess of what the goods would have sold for if there had been no tax. The question is one of objective economic fact rather than one of subjective thoughts or statements relative to whether the tax burden is shifted or absorbed." (Emphasis supplied.)

The District Court in the above statement showed up the fallacy of subjective evidence with devastating effectiveness when it characterized the Government's claim as an argument that the plaintiff had shifted the tax "in some correspondence." If a tax can be shifted in correspondence, it is news to economists. One wonders whether the respondent would attribute such magic powers to correspondence in which a processor told his broker or customer that he was *absorbing* the entire burden of the tax.

(c) Effect of Section 907(e)(2) of the Revenue Act of 1936.

It is true that in Section 907(e)(2) of the Revenue Act of 1936, Congress indicated that evidence of the type characterized in this brief as subjective evidence would be proper rebuttal evidence. Consequently, by legislative fiat, such evidence was probably made relevant. But it still can be considered immaterial in that in most cases it has such a slight bearing on the real issue as to be of practically no value. Congress cannot make immaterial evidence material.

Facts exist independently of any statutory suggestions as to the type of evidence usable to prove them. Moreover, it is specifically recognized in Section 907(e)(2) that the subjective evidence described therein may not indicate anything of importance. It is only *in the absence of explanation* by the claimant that such evidence is given weight.

It is also important to remember that in some cases the type of evidence described in Section 907(e)(2) has an important bearing on the question. Where the article manufactured by the processor is a standard price article, like a five cent cigar or a five cent package of chewing gum, it is important to examine the circumstances surrounding a price increase or a change in type or grade of the processed article. Usually in the case of a standard price article selling for the same price over a long period of time, a processor must make an actual decision as to whether or not or to what extent he is going to shift the tax burden. His decision may or may not have an important effect on the amount of tax burden he actually bears, but evidence with respect to such decision is certainly entitled to consideration. But this situation is far different from that of a processor who sells bulk goods at constantly fluctuating market prices over which he has no control. He sells for the highest possible price at all times and those prices are determined by the law of supply and demand. What he does or thinks about a particular item of cost like a processing tax has absolutely no effect on his prices. Whether his prices or margins are greater than they would have been in the absence of the tax is a question of market forces, elasticity of demand and other objective economic factors. The state of mind of any individual or group of individuals has nothing to do with it.

CONCLUSION.

It is extremely unlikely that any processor either bore the *entire* burden of the processing tax or shifted the *entire* burden. The economic principles involved make it almost inevitable that the correct answer in any case lies somewhere between complete shift on the one hand and complete absorption on the other. Yet the subjective approach adopted by the Circuit Court in its opinion in the present case permits of no middle ground. All questions of degree are prohibited. This approach ignores objective economic facts and denies relief to claimants on some theory of admission against interest or estoppel, regardless of their actual injury.

The purpose of this brief has been to expose the logical fallacy of reliance on what has been characterized as subjective evidence and to indicate the nature of the problem involved in processing tax cases. Whether this Court reverses or affirms the decision of the Circuit Court, it is hoped that the Court in its opinion will expose the fallacy of subjective evidence and set forth clearly and emphatically the basic legal and economic principles which must govern the solution of the very difficult problem involved in processing tax cases.

Respectfully submitted,

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November 25, 1944.

APPENDIX.

There are set out below quotations from various treatises showing the nature of the economic problem involved in any determination of tax incidence.

Achieving a Balanced Agriculture, published in August, 1934, by the Agricultural Adjustment Administration. (Page 35.)

“Who pays the processing tax depends on the supply and demand conditions for a given commodity.

“Demand for a product may be either elastic or inelastic. It is inelastic when about the same amount of the product is bought, no matter whether the price is high or low. It is elastic when a rise in price is immediately followed by a drop in quantity sold.

“When demand is inelastic, the processing tax is likely to be paid by the consumer, since he will continue to buy even if the whole tax is added to the price of the goods.

“When demand is elastic, on the other hand, the consumer may pay less than the full amount of the tax if the same quantity of the product is put upon the market as before. In such cases, the producer and the distributor each try to make the other absorb the tax.”

Statement of Secretary Wallace, outlining economic bases for new sugar act and expected results. *Department of Agriculture Press Release*, March 15, 1937.

“Since in most instances the total cost of production (including duties and taxes) tends to be related to selling price, there is generally assumed to be a direct relationship between cost and price; but, in fact, the cost of production affects price only indirectly through its effect on supply. If the costs of production exceed price, there is a tendency for production to decrease, and the decreased supply causes an increase in prices. Thus, it will be noted that the quantity of the supply, and not the cost of production, is the direct casual factor in determining prices; and factors other than cost of production, in this case quotas, can supersede

cost of production in determining supply and, hence, in determining price."

- A. G. Buehler, *Public Finance* (New York, McGraw Hill Book Co., 1936), pp. 237-239.

"Because prices are determined by neither supply nor demand alone, tax shifting depends not solely upon the wishes of the sellers, but also upon the actions of buyers. * * * The more inelastic the demand for taxed goods the easier to add the tax to prices, because the required readjustments in supply are relatively small. The more elastic the demand, the more difficult to shift taxes (since supply must be adjusted substantially. * * * In this economic world of risks and obstacles, tax shifting operates slowly and painfully by overcoming friction and resistance."

- T. N. Carver, *Principles of National Economy* (Boston, Ginn & Co., 1921), p. 630.

"One of the first lessons that the student of taxation learns is that the payer of a tax sometimes shifts the burden in whole or in part on to someone else, thus relieving himself, in part at least, of the burden. This can come about only in the process of buying and selling. The person taxed, in other words, has no means of persuading anyone else, as a favor to himself, to assume the burden; he can only charge a higher price for what he has to sell, or pay a lower price for what he buys, thus recouping himself for what he has paid in the form of a tax. But this matter of raising the price of what one has to sell or depressing the price of what one has to buy is something which is not so easily done as said, as anyone can convince himself by trying it."

- E. D. Fagan and R. W. Jastram, *Tax Shifting in the Short Run*, *Quarterly Journal of Economics*, August, 1939, Vol. LIII, No. 4, p. 568.

"In the short-run, price will always be increased by an amount less than the tax. * * * The less elastic the demand curve for the product of an industry, the more nearly will the tax increase in price be equal to the amount of the tax."

S. H. Slichter, *Modern Economic Society*, pp. 745-746.

"The fact that taxes can be shifted does not necessarily mean that they can be shifted at once. A decade or two may elapse before a tax which raises the cost of producing a commodity is completely shifted to consumers."

Jacob Viner, *Cost Curves and Supply Curves*, *Zeitschrift für Nationalökonomie*, Band III, Heft 1, p. 26.

"The 'short' run is taken to be a period which is long enough to permit of any desired change of output technologically possible without altering the scale of plant, but which is not long enough to permit of any adjustment of scale of plant."

Quarterly Journal of Economics, November, 1938, pp. 55-56, (article by J. K. Hall, discussing the validity of an assumption that demands for taxed commodities are so inelastic that new and higher prices may be easily fixed).

"To accept this hypothesis is to deny the existence of widespread rival supplies, the effectiveness of commodity substitution, and the dynamic character of consumer want-scales. It is to ignore a basic economic concept that no individual or composite consumer demand is fully inelastic. It is rudimentary that all demands are *relatively* elastic. * * * Lastly, this baseless assumption of volatile prices, adjustable by producers at will without supply diminution, is a complete contradiction of the observed operation of economic forces."

SUPREME COURT OF THE UNITED STATES.

No. 148.—OCTOBER TERM, 1944.

Wehre Steib Company, Ltd., Petitioner, vs. Commissioner of Internal Revenue.	} On Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.
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[February 12, 1945.]

Mr. Justice JACKSON delivered the opinion of the Court.

This is a proceeding brought for recovery of sugar processing taxes paid under the Agricultural Adjustment Act of 1933. The Commissioner having denied in entirety the taxpayer's claim for \$8,169.97, the total tax paid by it, taxpayer petitioned for review by the Processing Tax Board of Review, as provided by statute, 49 Stat. 1749. The Board awarded refund in the amount of \$3,655.82, and motions for rehearing made by both parties were denied by the Tax Court, which had succeeded to the jurisdiction of the Processing Tax Board of Review. 56 Stat. 798. On appeal, the Court of Appeals for the Fifth Circuit reversed and held that the claim should be denied. 140 F. 2d 768. We took the case to review questions of application of the "prima facie evidence" and "presumption" sections of Title VII, Revenue Act of 1936, on which there was conflict in the circuits. *Commissioner v. Bain Peanut Co.*, 134 F. 2d 853, cert. granted, 320 U. S. 721, dismissed on motion of petitioner, 321 U. S. 800; *Helvering v. Insular Sugar Refining Corp.*, 141 F. 2d 713; cf. *E. Regensburg & Sons v. Helvering*, 130 F. 2d 507.

A new administrative procedure for recovery of taxes paid under the Agricultural Adjustment Act was provided by Title VII of the Revenue Act of 1936, §§ 901-917, 49 Stat. 1747, 7 U. S. C. §§ 644-59, repealing §§ 21(d), (e), and (g) of the 1935 amendments to the Agricultural Adjustment Act, 49 Stat. 771-73. The provisions were reviewed at length and their constitutionality upheld in *Anniston Mfg. Co. v. Davis*, 301 U. S. 337. In outline, so far as relevant to this case, they are as follows: The claimant is required to prove that he bore the burden of the tax, § 902. Average "margins" per unit of the commodity processed,

consisting of the difference between cost of the commodity (plus tax paid, if any) and gross sales value of the articles resulting from the processing, are to be computed for the tax period and a base period; the base period is the period two years preceding imposition of the tax and the six months thereafter (February to July, 1936). §§ 907(b), (c). If the margins for the tax period are lower than those for the base period, it is "prima facie evidence" that, to that extent, the claimant bore the burden of the tax; if they are not lower, it is "prima facie evidence" that none of the burden was borne by the claimant. § 907(a). But this "presumption" may be rebutted either by the claimant or by the Commissioner, by proof of "the actual extent" to which the claimant shifted the tax to others. Such proof may include, but is not limited to, certain types of evidence described by the statute. § 907(e).

For our purposes the material facts must be gleaned from the findings and memorandum of the Board of Review and a stipulation filed by the parties in the Court of Appeals.

Petitioner is a grower and purchaser of sugarcane, which it processes into direct-consumption sugar and edible molasses.¹ It operates during the months of October, November, and December of each year. The tax went into effect on June 8, 1934 and petitioner paid taxes until November 8, 1935, so that it paid processing taxes—\$7,067.12 on sugar and \$1,102.85 on molasses—for the months of October, November and December 1934 and October and November 1935. Its average statutory margin for this period was \$.01192, and the total number of units processed was 2,256,676 pounds of sugar. Petitioner's base period consisted only of the two years prior to the tax because it did no processing in the six months February to July 1936. Its average statutory margin per unit for the base period was \$.01354. Thus the margin during the tax period was \$.00162 per unit lower than that during the base period, creating "prima facie evidence" that petitioner had borne the tax to the extent of \$3,655.82, the amount of refund allowed by the Board. Petitioner contends that this amount should have been increased by including in the margins its first processing after invalidation of the

¹ This processing was subjected to tax by the Act of May 9, 1934, c. 263, 48 Stat. 670, amending the Agricultural Adjustment Act. See especially § 9(d)(6)(A) and (B) of the Act as amended, 7 U. S. C. §§ 609(d)(6)(A), (B).

Agricultural Adjustment Act, which was its processing of the 1936 crop, October 1936 to January 1937. The average margin per unit for this period, computed as for the base period, was \$.01582, or \$.00228 more than the base-period margin.

Evidence that the tax was not borne by petitioner was as follows: Universal increases in the sale price of sugar were effected on the date of imposition of the processing tax in the amount of \$.55 per hundred pounds, to cover the amount of the tax. All of the accounts stated between petitioner and its broker, E. A. Rainold, Inc., respecting sales of molasses made through that broker, included the processing tax as a separate item and as an addition to the sale price of the article. "An account sale, typical of all such accounts, respecting the sale of sugar, made through its said broker" bore the notation, "Golden Ridge, 100 Pkts. 10,000± @3.71¢ \$371.00. F.O.B. Pltn. Tax Pd. Tax 0.526¢," \$.526 being the prevailing rate of processing tax at the time the particular account was rendered. A letter from the broker Rainold to petitioner, dated January 17, 1936, contained the following: "According to memorandum you furnished us on processing tax you paid on 298,017 pounds of sugar, and we have accounted to you for there [three] cars of 800 pockets and part car of 300 pockets and when we get paid for balance of this part car, or 500 pockets, it will total 3200 pockets or 320,000± on which the processing tax was included in the price. Therefore you have not paid anymore tax than you collected and these sugars in warehouse here and elsewhere, that is Chicago, or [are] really tax free."

On the foregoing facts the Board of Review found that "The extent to which the processing tax [was] paid and borne by the petitioner and not shifted to others in any manner whatsoever is \$3,655.82," and it awarded refund in that amount. This award was based, the Circuit Court of Appeals thought, "upon the theory that the claimant had established facts sufficient to invoke the statutory presumption that it had borne the burden of the tax" to that extent. In the view of the Court of Appeals, however, the evidence "clearly was sufficient to dissolve the presumption, and since there was no other proof to support any refund, the claim should have been disallowed in its entirety."

Our first question is whether the Board was entitled to base an award upon the statutory "prima facie evidence" or "presumption," or whether the Government's evidence removed the pre-

sumption from the case as a matter of law. For, although the Board did not state how it arrived at its award, it seems likely that it relied upon the *prima facie* evidence provisions and not upon a weighing of the evidence; petitioner does not assign error to the contrary, although it contends that the evidence supports the Board's award.

The statute, unfortunately, is beset by the ambiguity and the imprecision of definition which are not uncommon with respect to presumptions. But the difficulties of the subject will not excuse us from the duty to apply as best we may a statute Congress has seen fit to enact. At one point it speaks only of "*prima facie* evidence" and at another it refers to the prior section as creating a "presumption." "*Prima facie* evidence" alone might be taken to signify only a permissive inference, indicating that the Commissioner or the courts might, if they saw fit, permit a recovery solely on the basis of the margin evidence. See *Crane v. Morris*, 6 Pet. 598, 621; *Bailey v. Alabama*, 219 U. S. 219, 234; 9 Wigmore on Evidence (3d ed. 1940) § 2494. But the statute's later use of the word "presumption" and the careful detail with which the margin evidence and rebuttal evidence are described argue against such an interpretation, as does the legislative background. A committee report on Title VII, explaining the necessity for amending the existing refund provisions, stated: "It has been contended that while that section [§ 21(d) of the Agricultural Adjustment Act] states the conditions under which the Commissioner may deny a refund of taxes paid, it does not establish affirmatively any conditions, compliance with which will enable the claimant to secure a refund." Sen. Rep. 2156, 74th Cong., 2d Sess., p. 33. From this it seems clear that the new provision was meant to prescribe a minimum of proof which would require refund in the absence of opposing evidence. Therefore the inference arising from the margin evidence must be a compelled one.

The statute does not tell, however, on what event the existence of the presumed fact must cease to be assumed by the trier. Does the presumption cease to operate as soon as the Commissioner has met the burden of going forward with evidence to show shifting of the tax, or does it place on him the burden of proof? The Government and the court below, taking the former view, support it with the contention that "It is never the function of a rebuttable presumption to shift the burden of proof." *Commis-*

sioner v. *Bain Peanaut Co.*, 134 F. 2d 853, 857. It is unnecessary for us to take so broad a ground, even if it is correct.² Dealing only with the particular presumption now before us, we find nothing to indicate that Congress attached exceptional probative value to the margin evidence, or that it desired for any other reason to tilt the scales sharply against the Commissioner rather than merely to even them somewhat in behalf of claimants. There is, for example, no reason to suppose that the Commissioner is better able than the processor to prove where the tax burden fell. On the other hand, the special problem here of preventing unjust enrichment, added to the usual strict examination of claims against the Government, convinces that Congress probably intended to leave the burden of proof on the claimant. Cf. *United States v. Jefferson Electric Mfg. Co.*, 291 U. S. 386.

In the absence of any clearer statement in the statute, therefore, we think the presumption is given adequate effect if the burden is placed on the Commissioner of going forward with evidence sufficient to support a finding that the claimant did not absorb the tax. Once such evidence is presented, the presumption becomes inoperative and the issue is to be determined as if there had never been a presumption. The statute declares, however, that the presumption may be rebutted by proof of "the actual extent" to which the burden of the tax was shifted. This language appears to mean that the presumption may be rebutted pro tanto, and not necessarily all at once or not at all. Thus it does not cease to operate on introduction of evidence merely sufficient to support a finding that some of the tax was shifted. It must be evidence sufficient to support a finding that the entire tax was shifted. Short of that, the presumption is not eliminated but only diminished to the extent that the rebuttal evidence will support a contradictory finding. See *E. Regensburg & Sons v. Helvering*, 130 F. 2d 507, 509. When the margins are unfavorable to the taxpayer and favorable to the Commissioner, it is unnecessary, of course, to place a burden of going forward with

² But see, e. g., *Morrison v. California*, 291 U. S. 82, 88-91; *Page v. Phelps*, 108 Conn. 572; *Weber v. Chicago, R. I. & Pac. R. Co.*, 175 Iowa 358; *Bond v. St. Louis-San Francisco Ry. Co.*, 315 Mo. 987; *Holzheimer v. Lit Brothers*, 262 Pa. 150; *Morgan, Instructing the Jury upon Presumptions and Burden of Proof* (1933) 47 Harv. L. Rev. 59, 77-83, *Some Observations Concerning Presumptions* (1931) 44 Harv. L. Rev. 906; *Bohlen, Studies in the Law of Torts* (1926) 636, 637, 648-53; American Law Institute, Model Code of Evidence, Rule 703.

evidence on the claimant, for he has that burden anyway, as well as the burden of proof. Whether this means that the statute's language making the presumption operate in favor of the Commissioner is superfluous, or that in such a case the presumption must be given a different effect than when in favor of the claimant, we do not now decide. Cf. *E. Regensburg & Sons v. Helvering*, *supra*.

On the view we take of the statute, the proof introduced by the Commissioner made the presumption inoperative. We certainly could not say that, viewed by itself, the Commissioner's evidence would not permit a finding that petitioner shifted the entire burden of the tax. It tended to show that in all dealings with its broker the petitioner added the amount of the tax to the sale price and itemized it separately. That this was true as to all sales of molasses seems to be conceded. It was also true, or so it might be found, as to a substantial part of the sugar sales, and therefore inferentially as to all such sales. Petitioner raises some question as to the proper inference to be drawn from the sugar account and the broker's letter quoted above. But at least the broker's remarks that "the processing tax was included in the price" and "Therefore you have not paid any more tax than you collected" are unmistakable in their meaning. All of this evidence is among the kinds expressly mentioned by the statute as tending to rebut the presumption. More important, the statute appears specifically to provide that introduction of any evidence of this particular kind shall be sufficient to rebut the entire presumption. It states that the presumption may be rebutted by proof that the claimant modified sales contracts to reflect the initiation, termination, or change in amount of the tax, or "at any such time" changed the sale price of the article, or "at any time" billed the tax as a separate item, or indicated "by any writing" that the sale price included the amount of the tax. It then declares, "but the claimant may establish that such acts . . . do not represent his practice at other times." § 907(e)(2). This seems clearly to mean that when any examples of the named practices are proved, it may be inferred that they represent the uniform practice of the claimant and the burden becomes his to prove that they do not. Since the Commissioner proved that not only in a few cases but in a great number the tax was indicated in writing to be included in the sale price, we think there is no doubt that he fully rebutted the presumption within the meaning of the statute.

The second question is whether, with the presumption out of the case, there is evidence from which the Tax Court would be entitled to award a refund to petitioner in any amount. The court below, although it remanded the cause, apparently meant for it to be dismissed, for it said, "since there was no other proof to support any refund, the claim should have been disallowed in its entirety." Literally, of course, this cannot be true, for the margin evidence remained in the case for whatever it might be worth apart from the presumption. With this the Government agrees, and it concedes that, unless we can say that the evidence would not rationally support a finding in favor of petitioner, the case must go back to the Tax Court for decision on the evidence rather than on the presumption. We must determine whether there is evidence which is legally sufficient for administrative action, but we may not weigh it. *Dobson v. Commissioner*, 320 U. S. 489.

The fact that margins for the tax period are lower than those for the base period has some logical tendency to establish that the burden of the tax was borne by the processor. See *Annisston Mfg. Co. v. Davis*, 301 U. S. 337, 354. There are, to be sure, other and conflicting inferences which may also be drawn. As the margins are defined, the drop might be due to a decline in the demand for the processed goods, or to a decrease in the yield of the raw commodity, or to an increase in the price of the raw commodity. But we have no basis for saying that the margin thus defined does not tend to be comparatively stable and that a fall coincident with imposition of a tax would not more likely reflect the tax than a change in other factors. We suppose the taking of average margins over a base period has some tendency to produce that result. And the Tax Court's special experience might support such an inference. Cf. *Dobson v. Commissioner*, *supra*. Congress apparently believed that the rational connection was strong enough to justify basing a finding of absorption on the margin evidence alone. For, as we have seen, Congress intended that in a case where the margins were favorable to the claimant and no other evidence was introduced the claimant should be entitled to a refund, and there appears no reason of convenience or policy which would lead to such a rule in the absence of rational connection. For all these reasons we think a finding of absorption which was based solely on the margin comparisons would not be irrational.

Nor is the Commissioner's evidence so conclusive as to deprive the margin evidence of all significance. It permits but does not require a finding that petitioner had a uniform practice of billing the tax as a separate item. Even though such a practice be inferred, there is no evidence to show how far petitioner succeeded in its effort to pass the tax on, except for the evidence that there was a general rise in the market on a date some months before petitioner's processing began. The margins are some evidence that the price may not have responded continuously to the effort to shift the tax. The fact may be that neither side's evidence goes very far toward demonstrating where the burden of the tax fell;³ the inquiry is at best a difficult one. But we do not think it can be said that the record is devoid of rational support for a finding that petitioner absorbed some of the tax. Accordingly we must remand the case for a weighing of the evidence, including, of course, such further evidence as ~~the~~ Court may think it proper to receive in view of the way in which the case has been tried. In doing so we intimate no opinion, of course, as to whether petitioner has sustained the burden of proof placed upon it by the statute.

the Tax

Since the case must go back, it is necessary to pass upon a further question raised by petitioner. Petitioner, as we have noted, was not processing during the six months, February to July 1936, designated by the statute for computing margins after the tax period. For such a case the statute provides: "If during any part of such period the claimant was not in business . . . the average prices paid or received by representative concerns engaged in a similar business and similarly circumstanced may with the approval of the Commissioner, where necessary for a fair comparison, be substituted in making the necessary computations." § 907(c). Contending that there were no similarly circumstanced concerns, petitioner sought to use the figures of a later period, that of its own 1936 production, in computing the base-period margins, which would have made those margins higher. We think the Board and the court below were correct in holding that the statutory method of making a prima facie case is exclusive and that the 1936 evidence might not be so used. The statute's restrictions, however, have reference only to the presumption:

³ See Johnson, *AAA Refunds: A Study in Tax Incidence* (1937) 37 Col. L. Rev. 910.

they do not exclude other evidence generally relevant on the issue of whether the tax burden was shifted. The 1936 experience, though it could not help petitioner to create a favorable presumption, was entitled to be given whatever probative value it might independently have had and, subject to the usual principles of admissibility, was therefore admissible. *Anniston Mfg. Co. v. Davis*, 301 U. S. 337, 355-56.

The judgment below is modified and the cause is remanded to the Circuit Court of Appeals with directions to remand to the Tax Court for proceedings in conformity with this opinion.

Mr. Justice RUTLEDGE, dissenting.

I doubt that Congress intended to involve the award of refunds of processing taxes in the abstruse learning of "disappearing presumptions." In my opinion the terms "prima facie evidence" and "presumption" may be taken to have been used interchangeably in the statute. I think no more was intended than to authorize a finding in accordance with the margin evidence, if no other were presented; and in case opposing evidence should be offered, to allow inference either way according to the weight of the proof, taking into account the margin evidence. Hence, in this aspect of the case, I would rest on the decision of the Processing Tax Board of Review, which on the record reasonably may be considered to have been reached in this manner.

I also think the statute forbids going outside the base periods prescribed for comparative data. To hold otherwise would nullify the base period provisions of the Act, which I think are valid. The cause of action here rests on a waiver of the sovereign immunity to suit which Congress may make upon such conditions as it chooses. *Nichols v. United States*, 7 Wall. 122; *Luckenbach S. S. Co. v. United States*, 272 U. S. 533, 536; *Minnesota v. United States*, 305 U. S. 382, 388. Allowing in the evidence concerning other periods, though not for the purpose of computing margins, accomplishes indirectly what the base period provisions were designed to prohibit.

Accordingly, I think the judgment of the Circuit Court of Appeals should be reversed, with directions to affirm the decision of the Processing Tax Board of Review.

Mr. Justice BLACK concurs in these views.